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No. _____

In the Supreme Court of the United States

October Term, 1983

JOHN D. McKEEL, et al.,

Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN and
THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Foreign Sovereign Immunities Act shields Iran from jurisdiction of United States courts to hear a tort action brought against Iran by former hostages and their family members arising out of intentional crimes committed by the Government of Iran on United States Embassy premises in Tehran, Iran.

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THE ISLAMIC REPUBLIC OF IRAN and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James H. Davis, on behalf of John D. McKeel, et. al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix A, *infra* A1-17) is reported at 722 F.2d 582. The motion to dismiss at the district court for all plaintiffs except for Susan Roeder was unreported, as was the motion to dismiss in the case of Susan Roeder. The opinion of the D.C. Circuit Court of

[1] The other parties to this case are petitioners Charles Wesley Scott, William B. Royer, Jr., Donald A. Sharer, Leland Holland, David Roeder, Paul Needham, Duane Gillette, Alan B. Golacinski, Malcolm Kalp, Charles Jones, Jr., William A. Gallegos, William Belk, Elizabeth Scott and Susan Roeder.

Appeals of March 13, 1984 (Appendix B, *infra*, B1-16) is unreported. The vacated opinion of the D.C. Circuit Court of October 8, 1982 (Appendix C, *infra*, C1-26) originally reported at 690 F.2d 1010 has been withdrawn. The motion to dismiss at the district court was unreported.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on December 30, 1983. The petition for rehearing by the Ninth Circuit Court of Appeals was denied on February 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The filing period for obtaining a writ of certiorari is ninety (90) days from the entry of judgment. 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDERS INVOLVED

The constitutional provision involved is Art. I, Section 8, Cl. 10. The statutory provisions involved are the Crimes and Criminal Procedure Act (special maritime and territorial jurisdiction of the United States), 18 U.S.C. § 7; Foreign Sovereign Immunities Act, 28 U.S.C. § § 1330, 1602, *et seq. hereinafter* "FSIA") Judiciary and Judicial Procedure Act (Alien's action for tort), 28 U.S.C. § 1350; Federal Tort Claims Act (Exceptions) 28 U.S.C. 2680; and the District of Columbia longarm statute, 13 D.C. Code Section 13-423 (1973). The Executive Orders involved are Executive Order 12283, 46 Fed.Reg. 7927. The regulations involved are 31 C.F.R. Section 535.216 (1981). Pertinent texts of the foregoing are set forth in Appendix D1-10.

STATEMENT

1. John D. McKeel, Jr., Charles Wesley Scott, William B. Royer, Jr., Donald A. Sharer, Leland Holland, David Roeder, Paul Needham, Duane Gillette, Alan B. Golacinski, Malcolm Kelp, Charles Jones, Jr., William A. Gallegos, and William Belk, were among the 50 United States nationals seized during the United States Embassy takeover in Tehran, Iran on November 4, 1979, and each was held through and including January 19, 1981. During this time each was held prisoner with

the knowledge, consent and assistance of the Iranian government. Each was subject to abuse, privation, mistreatment, neglect, battery and torture under such auspices, and upon the Embassy grounds.

Each captive, in addition to the physical restraint amounting to false imprisonment, suffered personal injuries including malnutrition, beatings, threats, infectious disease and other abuses in varying but always significant amounts.[2]

Elizabeth Scott was the wife of Colonel Scott; Susan Roeder was and is the wife of Colonel Roeder.[3] Each hostage family member, in addition to estrangement from their loved ones, suffered depression, anxiety and other personal inflictions as a direct result of the actions of defendant Iran.[4]

The seizures and subsequent internment of embassy personnel, unprecedented in the history of international relations, resulted in various United States efforts to secure the hostages' release, including trade sanctions, and a military rescue operation costing American lives. Ultimately, the release was effected only by Executive Orders, in which the United States traded expungement of claims of U.S. citizens, including those of the hostages themselves, against Iran in exchange for the hostages' release.

2. Nine former hostages and wives of two of the ex-hostages brought individual actions before the district court. Petitioners asserted federal question and diversity jurisdiction over the Islamic Republic of Iran, 28 U.S.C. § § 1331 and 1332, as well as jurisdiction derived from the Foreign Sovereign Immunities Act, 28 U.S.C. § §1330 and 1602, *et seq.* The government moved to dismiss the actions under Federal Rule of Civil Procedure, Rule 12(b) on the grounds of lack of subject matter jurisdiction over the matters addressed therein, failure to state a claim on which relief could be granted, and improper venue. Shortly thereafter, four additional hostages filed complaints.

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[2]The above facts are abstracted from the respective complaints for the individual appellants in the United States District Court, Central District of California.

[3]*Id.*

[4]*Id.*

The claims of all thirteen hostages[5] and one of the wives were consolidated, and that of the second wife was heard separately. Both judges dismissed the actions for lack of subject matter jurisdiction, and for failure to state a claim on which relief could be granted. In its holding, the court held that Iran was not subject to the jurisdiction of United States courts, relying on "the plain language of the [Foreign Sovereign Immunities Act]." *McKeel, et al. v. Islamic Republic of Iran, et al.* No. CV 81-0931-WPG, slip op. (C.D. Oct. 26, 1981). The court read the statute to refer to damages occurring in the United States, and held that the United States embassy "is not within the United States." *Id.* The petitioners in the consolidated action filed a motion to alter the judgment with affidavits addressing the Fifth Amendment "taking" issue in the declaratory relief aspect of the case. The court affirmed its dismissal with respect to all relief sought. The venue question in both cases was never reached.

On appeal, all actions were consolidated. The Ninth Circuit unanimously affirmed the decision of the district court, finding lack of subject matter jurisdiction (app. A., *infra*, A6). The Ninth Circuit preliminarily concluded that 28 U.S.C. § § 1331 and 1332 do not confer jurisdiction over Iran, through lack of substantive federal law on point and transfer of jurisdiction to the FSIA, respectively. *McKeel, et al. v. The Islamic Republic of Iran and the United States of America*, 722 F.2d 582, A8-9. Thus concluding that jurisdiction could only exist under the FSIA, the Ninth Circuit then held that the FSIA did not confer jurisdiction over foreign states for personal injury or damages occurring in the U.S. Embassy in Iran. The court, while conceding "the literal reading of the statute supports this argument [for jurisdiction]," *Id.* at A10, stated a correct interpretation limits jurisdiction to instances of territorial sovereignty, *Id.* at A11. Further, the court noted "the proposition that Congress intended that the FSIA would make United States law on sovereign immunity consistent with international law." *Id.* It stated Congress' intent was to confine jurisdiction

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[5] William Belk was added after the appeal to The Ninth Circuit via stipulation. His addition raised the number to fourteen; however, Regis Regan has dropped out of the lawsuit as of January 12, 1984, reducing the current number in the present action to thirteen.

to traffic accidents caused by foreign embassy vehicles in the United States. Also, the court found the extension of territorial jurisdiction under the "nationality" and "protective principle" to be properly limited to jurisdiction over individuals, not foreign states. *Id.* at A13. Finally, the Ninth Circuit noted policy repercussions attendant to jurisdiction, leading to an unlimited scope of potential jurisdiction, disruption of foreign relations, and reciprocal expansion of tort liability. Petitioners filed for a rehearing, which the court denied (see App. E., *infra* E3).

In a similar action in the Court of Appeals for the District of Columbia, *Persinger et al. v. Islamic Republic of Iran, et al.*, No. 81-2003 slip op. (D.C. Cir. October 8, 1982), the court also affirmed the district court's dismissal for failure to state a claim on which relief could be granted under Federal Rules of Civil Procedure, Rule 12(b). However, the court reversed the lower court's additional ground of lack of subject matter jurisdiction over the United States embassy in Iran (App. C, *infra,* C15). The court based its reversal on the ground that pertinent legislative history of the FSIA is non-existent, leaving only the language itself. Of said language, the court noted, "That language does not require the territory to be territory of the United States in any absolute sense." *Persinger, vacated opinion, supra,* at C13. Further, the court noted that "The definition of the 'United States' does not in terms require that the covered territory be exclusively subject to United States jurisdiction. The definition is broad enough to embrace territory under the concurrent jurisdiction of the United States." *Id.* This includes American embassies abroad. Finally, in nothing that §1605(a)(5) by its terms does provide jurisdiction unless those actions were discretionary, the court cited the Federal Tort Claims Act, 28 U.S.C. § 2680(a) for the proposition that legal acts are not discretionary." *Id.* at C14-15.

The government petitioned for a rehearing with respect to the issue of subject matter jurisdiction, which was granted. On March 13, 1984 the court of appeals affirmed the district court's ruling on subject matter jurisdiction and vacated its prior opinion. *Persinger et al., v. Islamic Republic of Iran, et al.,* No. 81-2003, slip op. (D.C. Cir. March 13, 1984) (Appendix B, *infra,* B2). The court referred to FSIA Section

1603(c) in noting that the terms "continental and insular" modified the phrase "all territory and waters . . . subject to the jurisdiction of the United States" to refer to the continential United States, and such islands as are part of the United States or its possessions, *Persinger, on rehearing, supra,* at B7. With respect to interpreting legislative history and policy, the D.C. Circuit's revised opinion tracks in large part the Ninth Circuit's opinion which had been handed down two months earlier. The court additionally reasoned that the scheme in the legislative history of the FSIA on international relations implied that Congress did not intend to confer jurisdiction over Iran, because the resulting impact on foreign policy would have required some comment on same in the FSIA's legislative history. *Id.* at B9.

Policy grounds emphasized by the D.C. Circuit and not found in the Ninth Circuit's opinion were that the spectre of tort liability would have a chilling effect on foreign states' provision of services to U.S. embassies, for fear of suit "for negligent acts or omissions on those premises." *Id.* Finally, whereas jurisdiction for family members would exist *a fortiori* in its first opinion and was thus decided *sub silentio*, the court on rehearing was obligated to consider the family members' claims separately.

The majority found the language ambiguous with respect to the claim of family members residing at all relevant times in the continental United States. The majority states "It is . . . unclear whether both the tort and the injury must occur here or whether the tort may occur abroad and be actionable so long as the injury is suffered here." *Id.* at B12. Thus, the court decided the issue on policy grounds, finding that conferring jurisdiction here in light of its denial for the hostages would reward the less serious injury and set a precedent of indefensible line drawing where hostages dying from hostage injuries in Tehran and after release in the United States would be subject to different results. *Id.* The court also noted the requirement the tortious act be in the United States in the House Report. H.R.Rep. No. 1487, *supra*, at B13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612 (hereinafter "House Report 1487"). Finally, the majority noted the presence of "direct effect" language in §1605(a)(2), the commercial activity exception to immunity, and its absence in §1605(a)(5), from which the court inferred

that Congress did not intend jurisdiction merely from an effect within the United States in the case of non-commercial torts. *Id.*

In dissent, Judge Edwards stated: "[t]he statute plainly requires that only the injury and not the tortious act or omission, occur in the United States. I see no reason to resort to the legislative history to clarify the plain language of the statute." *Id.* at B15. Further, Judge Edwards saw no anomaly in Congress drawing the line at tortious acts outside the United States with direct effects in the United States. *Id.* at B16. As for the absence of "direct effect" language in § 1605(a)(5), Judge Edwards finds "nothing in the legislative history" to support the view expressed by the majority, and adds that Congress might have intended to "restrict jurisdiction more in cases involving commercial activity . . . than in cases involving non-commercial torts." *Id.*

The Ninth Circuit held similarly that jurisdiction did not issue for family members. The court cited a lack of minimum contacts satisfying the due process requirement of the personal jurisdiction aspect of the FSIA, House Report 1487, and a split on relevant judicial decisions. *McKeel, supra,* note 10, at A14-15.

In other related cases, *Williams v. Iran*, No. 81-1672, slip op. (D.C. Cir. October 19, 1982) and *Lauterbach v. Iran*, No. 81-1676, slip op. (D.C. Cir. October 19, 1982), the court of appeal affirmed district court judgments dismissing plaintiffs' claims against Iran, relying on its decision in *Persinger,* decided October 8, 1982 and subsequently vacated. In an earlier action, *Moeller v. Islamic Republic of Iran*, No. 80-1171, slip op. (D.D.C. Aug. 5, 1981), a district court dismissed plaintiff's claims without appeal. Two pending cases for extinguishment of hostage claims are pending in the United States Claims Court. *Cooke v. United States*, No. 581-82C (Ct.Cl.); *Amburn-Lijek v. United States*, No. 564-82C (Ct.Cl.).

REASONS FOR GRANTING THE PETITION

"This case presents an important question of federal law which has not been, but should be settled by this court. . ." *Sup.Ct.R. 17 (.1)(c).* The authority of United States courts to exercise jurisdiction over foreign states for claims of non-commercial intentional torts on United States embassy premises

is a question of first impression for this Court. *Amoco Production Co. v. Jicarilla Apache Tribe,* 449 U.S. 820 (1980). The Courts of Appeal for both the Ninth Circuit and D.C. Circuit have held that the FSIA does not confer jurisdiction on United States courts for such torts occurring on United States premises on foreign soil. As a consequence, petitioners may be unable to pursue Fifth Amendment claims of any substantial value against the United States in the United States Claims Court.

The holdings of both circuit courts of appeal have done violence to a basic tenet of statutory construction, i.e., to be guided by the unambiguous language of a statute, *Letelier v. Republic of Chile,* 488 F.Supp. 665, 671-672, (D.D.C. 1980); ignored the flux, *Playa Larga v. I. Congreso del Partido* (1981) 3 W.L.R. 328, 334, and flexibility of international law on the question of jurisdiction in deciphering congressional intent, *Hearing on Immunities of Foreign States Before the Subcomm. on Claims on Governmental Relations of the House Comm. on the Judiciary,* 93 Cong., First Sess. 18 (Testimony of Charles Brower) (1973) (hereinafter "1973 hearings"); and misconstrued the policy repercussions of finding jurisdiction while ignoring policy benefits of such conferral. Further, in reaching the specific question of jurisdiction on the claims of family members, the D.C. Circuit Court totally disregards the plain statutory language of the FSIA. Section 1605(a)(5) (1976), *Persinger v. Islamic Republic of Iran, on rehearing, supra,* at B15, dissent of Judge Edwards.

1.a. In its first *Persinger* opinion, handed down October 8, 1982, the D.C. Circuit Court began with the fundamental jurisdictional provision of the FSIA, §1605(a)(5). Noting that the section bars immunity except for discretionary functions for personal injury occurring in the United States, the court turned to §1603(c) for a definition of the United States under the FSIA. Finding no applicable legislative history, the court relied solely on the language of the statute. *Persinger, vacated opinion, supra,* at C13. The relevant section reads "The 'United States' includes all territories and waters, continental or insular, subject to the jurisdiciton of the United States." FSIA, §1603(c). The court observed simply, "That language does not require the territory to be territory in any absolute sense." *Id.* On dealing with the territorial issue, the *Persinger* court also noted that "The definition of 'United States' does not in terms

require that covered territory be exclusively subject to United States jurisdiction. The definition is broad enough to embrace territory under the concurrent jurisdiction of the United States." *Id.* This observation resolved the issue of jurisdiction at an embassy, where both the sending and receiving state exercise some regulation. *Id.* at C13-14.

Lastly, the court turned to the question of whether the FSIA would nonetheless provide immunity based on the discretionary function exception of §1605(a)(5)(A). Judge Bork, in writing for the court, adopted the definition used in the Federal Tort Claims Act, which Bork found to have "the same policy" as the FSIA, and to whose analogous provision the FSIA refers. *Id.* at C15. Under the Federal Tort Claims Act definition, patently illegal actions are not discretionary. *Id.* at 17. Finding that the seizure of the embassy and hostage detention violated "treaties as well as long established rules of general international law," *Id.*, the court concluded Iran's acts were illegal and thus not entitled to the discretionary function exception.

1.b. The Ninth Circuit handed down its decision on December 30, 1983, and denied on February 22, 1984 petitioners' petition for rehearing. The Ninth Circuit, in contrast to the D.C. Circuit in its first opinion, affirmed its district court on the issue of subject matter jurisdiction.[6] However, in so finding, the Ninth Circuit tracked the analysis of the D.C. Circuit regarding the territorial aspect of jurisdiction. In a telling concession, the Ninth Circuit's opinion stated "*Although a literal reading of the statute supports [jurisdiction],* we decline to accept [the arguments for jurisdiction] because we believe the intent of Congress was to the contrary." *McKeel, supra* at A10 (emphasis added). The Ninth Circuit thus unmistakably abandons the *language* of the FSIA as the vehicle of finding immunity.

Inexplicably, the Ninth Circuit then purports to find support in the statutory language for absence of jurisdiction. Finding that "Territory . . . is a primary basis for jurisdiction." *McKeel* at A11 (emphasis added), the court reasons syllogistically

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[6]In the instant case subject matter jurisdiction encompasses the issue of personal jurisdiction, i.e., sovereign immunity, by virtue of petitioners' sole reliance on the FSIA to invoke jurisdiction of the federal court. *Persinger, vacated opinion, supra,* note 7 at C7.

that since United States embassies are not United States territory, "United States embassies are not within the territorial jurisdiction of the United States." The conclusion does not follow from the court's own premise, which is that territory is *a* basis of jurisdiction, not *the* basis.

The Ninth Circuit was forced to distinguish *United States v. Erdos*, 474 F.2d 157, 159-60 (4th Cir. 1973); *cert. denied*, 414 U.S. 876 (1973), which had found that jurisdiction could be based on concurrent jurisdiction of a territory, but had involved an individual defendant and used a federal crime statute's definition of jurisdiction. 18 U.S.C. §7. The Ninth Circuit does not explain the material difference between commission of a criminal act and a tort in terms of conferring jurisdiction. However, petitioners' are in any case only required to resort to *Erdos* as a response to the government's contention that jurisdiction requires territorial sovereignty, i.e., ownership. This latter position begs the question. As the D.C. Circuit stated *supra*, the definition of United States in §1603(c) does not require territory be territory in any absolute sense. *Persinger, vacated opinion, supra*, at C13. Absent explicit restriction, the word "jurisdiction" is presumed to encompass nonterritorial jurisdiction. "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears." *Miller v. Robertson*, 266 U.S. 243, 250 (1924). Interpreting jurisdiction to its full extent and capacity requires the inclusion of nonterritorial jurisdiction. This Court has stated that Congress' ability to legislate for a territory "does not depend upon sovereignty . . . over territory." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948). The D.C. Circuit opinion clearly expresses the greater fidelity to the statutory language.[7]

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[7]Petitioners' function in the instant petition is to establish the government's failure to meet its burden of proof below and error of the courts of appeal in not so finding. The government's burden respecting a requirement of sovereign immunity is well established. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2nd Cir. 1964), *cert. denied* 381 U.S. 934 (1965); H.R. Rep. No.1487, 94 Cong., 2nd Sess. 17 (1976). Petitioners undertake no *systematic* attempt to prove jurisdiction.

1.c. On March 13, 1984 the D.C. Circuit, on petition for rehearing, vacated its earlier opinion. It found that the language of §1603(c) did not remove Iran's immunity. First the court noted that the jurisdictional grant of §1605(a)(5) for the United States was defined under §1603(c) as "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Persinger, on rehearing, supra,* at page B5. Judge Bork in reversing his earlier view on the language of the section, contends that all territory is continental or insular; therefore to say "all territory and waters, all territory (substituting all territory for continental or insular), subject to United States jurisdiction," would be plainly redundant. Thus, to avoid redundancy, Bork reasons, "continental or insular" must mean only the continental or insular United States or its possessions.

Bork's interpretation of §1603(c) is suspect. It rests on the proposition that continental or insular, i.e., "all territory," *Id.*, equals petitioners' version of territory subject to United States jurisdiction, i.e., "any territory over which the United States exercises any form of jurisdiction . . . ," thus making continental or insular redundant. Clearly, however, petitioners nowhere argue that all territory in the world is subject to United States jurisdiction. Under petitioners' reading, the phrase "continental or insular" merely preserves for jurisdiction all types of territory, whether continental or not, within that territory which in the first instance is subject to United States jurisdiction. It is not necessary to change the word "insular" from its natural meaning, "of, relating to, or constituting an island," *Webster's New Collegiate Dictionary,* G. & Merriam Company, Springfield, Mass. (1979), to avoid statutory surplusage.

Had the authors of the bill intended "continental or insular" to mean the continental United States or its island possessions, there is no reason they could not simply have rephrased §1603(c) to reflect such a definition. In the original draft of §1605(a)(5), the fundamental jurisdiction provision of the FSIA, the Congress clearly indicated its wish *at that time* to restrict United States courts to territorial jurisdiction:

> "§1605. *General exceptions to the jurisdictional immunities of foreign states.*

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case . . .
>
> * * *
>
> (5) In which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *caused by the negligence or wrongful act or omission in the United States* of that foreign state . . ." H.R. 3493, 93 Cong. 1st Sess. (1973) at 3-4 (emphasis added).

Unlike the language of the enacted statute, which refers to "personal injury or death . . . occurring in the United States and caused by" the tort of a foreign state, FSIA, §1605(a)(5), the original draft above states the tort itself must occur in the United States.

Absent congressional modification, the phrase "continental or insular" should be interpreted in its natural sense; statutory surplusage is not an inevitable consequence. Clearly the language requirement found on rehearing was not so strong as to merit the court's attention on first impression. In sum, neither the Ninth Circuit nor the D.C. Circuit on rehearing offered convincing arguments for interpreting the language of §1603(c) to restrict jurisdiction to the territorial variety. Only the D.C. Circuit's first opinion observes the plain language of §1603(c).

2. When "[T]he language of a statute controls when sufficiently clear in its context . . . further inquiry may be unnecessary." *Ernst & Ernst v. Hochfelder* 425 US 185, 201 (1976), *rehearing denied.* While the plain language of §1603(c) seemingly does not "require the territory to be territory in any absolute sense," *Persinger, vacated opinion, supra,* at C13, the Ninth Circuit and the D.C. Circuit on rehearing rely heavily on congressional intent to find immunity.

Both circuits argue that congressional intent was to render the FSIA consistent with international law, which provides for loss of "immunity for tortious acts only where they occur in the territory of the forum state." E.g., *McKeel* at A11. In point of fact, international law and practice have not definitively established a right of sovereign immunity. *Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States,* 28 Brit. Y.B. Int'l

L.220, 228 (1951), and certainly has not settled the precise extent of any such immunity. *Playa Larga.* Careful examination of the government's brief in the D.C. Circuit indicates that the European Convention on State Immunity would consider the question here as one of first impression. International law *a fortiori* has not developed a rule prohibiting jurisdiction in the case at bar.

As for the element of consistency with international law, the legislative history discloses an intent to render the FSIA *close* to international law. "The statute has been drafted keeping in mind what we believe to be the general state of law internationally, so that we conform *fairly closely*, we believe, to our accepted international standards." 1973 Hearings (emphasis added). Given the unsettled nature of international law, each state necessarily defines its jurisdictional parameters for particular situations. *Playa Larga, supra.*

International law in fact generally prescribes jurisdiction over international crimes such as hijacking, piracy, genocide and hostage taking. J. Sweeney, C. Oliver & N. Leech, *The International Legal System: Cases and Materials,* 120-21 (2d Ed. 1981). It is beyond question that hostage taking is an international crime. The International Convention Against the Taking of Hostages, U.N. Doc. A/34/819 (1979), *reprinted in* 74 Am. J. Int'l. L. 277-83 (1980), as adopted by the U.N. General Assembly in 1979 and ratified by the United States in 1981 (*hereinafter,* International Convention). This principle also applies to tort claims directly arising out of such crimes: ". . . international law does not preclude the application of non-criminal [i.e. tort] law on this basis." Restatement (Revised). *Foreign Relations Law of the United States* §404, comment (b) (Tent. Draft No. 2, 1981). Further, the United States Constitution authorizes Congress "To define and punish Piracies and Felonies committed on the high seas, and *Offenses against the Law of Nations.*" Article I, §8 Cl. 10 (emphasis added). This mandate has been carried out in such legislation as the Judiciary and Judicial Procedure Act, (Alien's Action for Tort), 28 U.S.C. §1350. *Supra, E.g. Filartiga v. Pena-Irala,* 63 F2d 876, 885 (2d. Cir. 1980).

We are left with two propositions: international as well as United States law and practice is settled on granting jurisdiction

over international crimes such as hostage taking; and international law is uncharted on the specific question of sovereign immunity for non forum torts. Where, as here, the torts are incident to international crimes, the sole question seems to be whether the international norm of jurisdiction over international crimes is preempted by the international norm of sovereign immunity. The existence of the former norm is well settled; the existence of the latter norm is not definitively settled, and its scope is a matter of first impression. Under these circumstances, the government's argument that sovereign immunity is preemptive as a matter of international law is untenable.

Both circuits also contend that Congress intended that the FSIA cover only traffic accidents. *McKeel, supra* at A11. For example, the Ninth Circuit states "Section 1605(a)(5), the exception for non-commercial torts on which appellants rely, is directed primarily at the problem of traffic accidents in the United States caused by automobiles operated by a foreign embassy. The legislative history makes this clear." *E.g. McKeel,* referring to H. R. Rep. No. 1487, 94 Cong., 2d Sess. 16 (1976) at 20-21, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605-06, 6618-20. However, it is undisputed that "Congress has the power to exercise jurisdiction over certain activities at U.S. embassies abroad. . ." *Persinger, on rehearing, supra,* at B6. The fact that the drafters of the FSIA considered traffic accidents in the United States indicates merely that application to embassies overseas was unconsidered, not repudiated. *See Heart of Atlanta Motel v. United States,* 379 U.S. 241, 261 (1964).

Also, under 28 U.S.C. §1350, district courts have "original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations . . ." It seems unlikely that Congress would not have intended the FSIA to apply to overseas embassies to protect United States citizens and diplomatic personnel in light of the statutory protection for aliens. Given that the embassy seizure was a crime against the law of nations, *supra,* it seems facile to distinguish the two situations on the dubious premise that tort actions by aliens in United States courts would not have impact upon foreign relations.

Also on the matter of congressional intent, the D.C. Circuit infers from a silent legislative record on the foreign relations

impact of removing immunity that Congress' intent was that the FSIA not confer jurisdiction in the instant case. The court says if Congress' intent were otherwise "it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in [the United States]." *Persinger, on rehearing, supra,* at B9. However, as stated *supra*, Congress' nonconsideration of the jurisdiction issue with regards to United States embassies overseas at the time of drafting would have precluded legislative commentary on the foreign relations impact. To reiterate, nonconsideration is not equivalent to consideration and rejection. Since the drafters did not consider the issue of overseas jurisdiction, let alone distinguish between the instant aggravated situation and torts in United States embassies in general, it seems futile to speculate on Congress' assessment of the impact of finding jurisdiction on foreign relations. Secondly, as discussed *infra*, an unsettling impact on foreign affairs is highly debatable.

3. The Ninth Circuit and the D.C. Circuit also rely heavily on public policy considerations in reaching their holdings against petitioners. The arguments are: overbroad jurisdiction leading to interference with foreign policy, *McKeel, supra,* at A13, high United States exposure based on reciprocity; and a "chilling effect" on foreign states' services. *Persinger, on rehearing, supra,* at B10 *et seq.*

Both circuits state that nonterritorial jurisdiction would give "unlimited geographical scope," to the FSIA, *E.g. Persinger, on rehearing, supra,* at B10-11, resulting in "for example . . . the French government . . . [being] subject to suit in the United States if a French government vehicle were involved in an automobile accident on the U.S. embassy grounds in West Germany." Such an example incorrectly equates § 1605(a)(5) with the one example cited in the legislative history, *supra.* Further, it is plain that the facts of the instant case set no such precedent. While abrogation of immunity for Iran would extend the scope of the FSIA beyond the territorial United States, it by no means would require jurisdiction in the case of traffic accidents, or necessarily over any tort not incident to international crimes.

The two alleged products of overbroadness are interference with foreign policy and reciprocal liability. In *McKeel,* the

court states "[s]uch an unprecedented assertion of jurisdiction against *foreign states* could interfere with the conduct of our foreign policy . . ." it is difficult to see how abrogating immunity in the instant case would lead to interference with foreign policy in the future. This case is set firmly in the context of a valid executive order[8] preventing action against Iran.[9] The instant action does nothing to abrogate that order or renege on the international agreement which it embodies. Thus, it follows that jurisdiction here does not imply that jurisdiction would in future instances necessitate reneging on international agreements. "We attempt to lay down no general guidelines covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore v. Regan*, 453 US 654, 661 (1981).

Both circuits state that a decision to exercise jurisdiction would subject the United States to suits abroad for torts committed on the premises of foreign embassies located in the United States, based on reciprocity. *Persinger, on rehearing, supra*, at B10, *McKeel, supra*, at A14. This projection presupposes that jurisdiction over Iran in this case necessitates jurisdiction over foreign states for all torts committed against United States citizens on U.S. embassy grounds, or even on "military and naval bases around the world, since the United State exercises jurisdiction in such locations." *Persinger, on rehearing, supra*, at B10.

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[8]Executive Order 12283, 46 Fed. Rec. 7927; *See also* Addendum, Iranian Assets Litigation Reporter (February 6, 1981) 2361, (Algerian Accords); 31 C.F.R. Section 535.216 (1981).

[9]The two circuit courts seem especially concerned about jurisdiction in garden variety tort actions. This case is not those cases, and therefore the government's extrapolation to the three country automobile scenarios, *Persinger, on rehearing, supra*, at B10, is particularly inapposite. Further, the impact of such suits on foreign relations is arguable. If a country's vehicle injures a United States diplomat in a third party country, the fact of such suit is not changed, the choice of forum merely expanded, European Convention on State Immunity, Articles 7, 11, Counsel of Europe No. P 74 (1972). Further, the defendant foreign state has the doctrine of *forum non conveniens* available where the forum is greatly removed from the tort site. *See Gibbons v. Udaras na Gaeltachta* 549 F.Supp. 1094 (S.D.N.Y. 1982).

However, it does not follow that jurisdiction over Iran in the instant case implies jurisdiction over United States embassies abroad for all purposes. *Dames & Moore, supra.* The facts here are uncommon if not unique. They pertain to torts incident to intentional, protracted behavior constituting international crimes (International Convention), not to common acts of negligence. As there is no basis for assuming jurisdiction will follow for ordinary torts, there is none for anticipating a torrent of international retribution via reciprocal jurisdiction. Under the facts here, even the rare nation in Iran's position would only assert jurisdiction under true reciprocity for a United States seizure of that country's embassy in the United States, not for unintentional torts such as traffic accidents. Finally, under the facts here, the executive order insulating Iran from civil liability is unaffected by finding jurisdiction. No foreign country will face exposure to tort damages under this case.

The D.C. Circuit's argument, *Persinger, on rehearing, supra*, at B10, that foreign governments would not provide services for fear of suit if immunity is removed, is without foundation. As stated by Flag, Inc. in its brief *amicus curiae* on behalf of the appellants in the D.C. Circuit rehearing, foreign governments are currently liable in tort for their activities within the United States, yet foreign agents and officials travel freely within the United States in the exercise of official duties. Brief *Amicus Curiae* of Flag, Inc., Persinger v. United States of America and the Islamic Republic of Iran, on rehearing, United States Court of Appeals for the District of Columbia Circuit (February 22, 1983) (unpublished brief at 43-44) *hereinafter* Flag *amicus* brief).

Further, any concern about nonapplication of the discretionary function exception of the FSIA, 28 U.S.C. §1605(a)(5)(A) in the context of embassy services such as police and fire rests on no firmer ground than the projections of unlimited assertions of jurisdiction and consequent heightened exposure to liability. The premise of all these projections is that this Court will extend its holding beyond the special facts of this case. *Dames & Moore, supra.* Traffic accidents in the course and scope of employment, *Dalehite v. United States,* 346 U.S. 15, 27-28 (1953), are not intentional torts incident to international crimes against "all civilized law." United States brief

in Persinger v. Islamic Republic of Iran and United States of America, on rehearing, United States Court of Appeals for the District of Columbia Circuit (January 24, 1983) (unpublished brief at 3).

Petitioners submit the existence of strong public policy considerations favoring the removal of immunity in the instant case. The International Convention, *supra*, p. 13; the 1973 New York Convention for the prevention of Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. A/3166 (XXVIII), February 5, 1974, *Signed* December 14, 1977, *in force* February 20, 1977, 28 U.S.T. 1975, T.I.A.S. no. p. 8532, ____ U.N.T.S. ____ (1973); the Universal Declaration of Human Rights, G.A.Res. 217, U.N. Doc. A/810 at 71 (December 10, 1948), and The International Covenant on Civil and Political Rights, annex to G.A.Res. 2200, 21 U.N.G.A.O.R. Supp. (No.16) at 4952, U.N.Doc.A/6316 (1966), are examples of international agreements, the first two of legal force, which condemn hostage taking or attacks on foreign government officials and call for their punishment.

The legitimacy of the Executive Order notwithstanding, to omit the instant acts of heinous international crimes and torts from the scope of §1605(a)(5) is to invalidate the spirit of the agreements above. Daily we see the escalation of political terrorism around the world. Diplomatic premises have not been spared in this regard. Petitioners respectfully submit that this case presents a unique opportunity for this Court to send a signal that the sanctity of our diplomatic missions must be respected, and that there may be a heavy price for not doing so.

Additionally, while not disputing Congressional approval of the Executive's discretion in disposing the hostages' claims against Iran, *Cf. Dames & Moore, supra,* at 680; *Persinger, vacated opinion, supra,* at C21, this Court is the last forum for those individuals who under circumstances not amounting to political blackmail would have civil causes of action for over fourteen months of kidnapping, during which they were subjected to neglect, battery and torture. Opening Brief for Appellants, McKeel, et al. v. The Islamic Republic of Iran, and the United States of America, United States Court of Appeals for the Ninth Circuit, (August 6, 1982) (unpublished brief at 4). The

hostages cannot reasonably be expected to pursue a tortfeasor foreign state in that state's courts, where the independence of the judiciary is not as here a Constitutional principle, United States Constitution, Art. III, or where absolute sovereign immunity from non-commercial torts obtains. Cf. Federal Tort Claims Act, 28 U.S.C. §2674, FLAG, *Amicus* brief at 46-47.[10]

Thirdly, while Iran would face no financial exposure due to the president's Executive Order No. 12283, the granting of jurisdiction would at least signal would-be terrorists that premeditated international crimes and intentional and heinous torts against diplomatic officials and United States citizens would be potentially costly. Finally, a disincentive to the life threatening torts such as those perpetrated here would seem to be a sounder allocation of policy resources than attempts to preserve foreign services to embassies. It is quite possible that the signal resulting from allowing jurisdiction here would cement rather than disrupt foreign relations among the vast majority of nations, which abhorred the hostage seizure.

4. On the question of jurisdiction for hostage family members[11], the Ninth Circuit rested its denial on the grounds of legislative history, a disagreement in the cases, and due process contentions, *McKeel, supra*, note 10 at A14-15. The legislative history argument relies on House Report 1487. As for this report, as Judge Edwards states in his powerful dissent on jurisdiction for family members in the D.C. Circuit, "Congress never enacted the language of the House Report that 'the tortious act or omission must occur within the jurisdiction of the United States.' " *Id.* at B15. Not only did Congress specifically delete this phrasing in the bill's final form, *see supra*, p.12, but in any case "within the jurisdiction of the United States" is clearly not delimited to the United States proper. *Vermilya-Brown Co.*

As for disagreement in the cases, one of the cases cited by the Ninth Circuit as standing for the proposition that the tortious act must occur in the United States, *Frolova v. Union of Soviet*

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[10]Additionally, the ability of the courts of the foreign state to obtain pertinent evidence may be hampered by principles of inviolability of diplomatic premises. Flag *amicus* brief at 47.

[11]The Ninth Circuit Family members were wives, and the D.C. Circuit Family members were parents.

Socialist Republics, 558 F.Supp. 358, 362 (N.D. Ill. 1983) is pure dictum, *Persinger, on rehearing, supra* at B15. Further, the other such case based its opinion primarily on the language of the unenacted House Report 1487. *In re Sedco, Inc.,* 543 F.Supp. 561, 567 (S.D. Tex. 1982).

In contrast, *Letelier, supra* at 674, strongly and unequivocally holds that the tortious act need not occur in the United States. As the *Letelier* court states,

> "To hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the act 'through the backdoor, under the guise of the act of state doctrine.' H.R. Rep. No. 94-1487, *supra* at 20 n. 1 quoting Amicus Brief of United States at 41, *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976)); S.Rep. No. 94-1310, *supra* at 19 n. 1 (same)." (emphasis added.)

Thus, there is substantial reason to conclude that the case law does not support the argument that §1605(a)(5) can be read to require the tortious act occur in the United States. Even the Ninth Circuit itself states "The language of §1605(a)(5) suggests that only the injury need occur in the United States..." *McKeel, supra,* note 10 at A15.

Finally, the Ninth Circuit contends that the personal jurisdiction aspect of the FSIA requires satisfaction of due process requirements of minimum contacts with a forum under *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), which are not met here. The Ninth Circuit believed a single instance of injury in the forum as a consequence of an out of state act is insufficient to satisfy the standards of *International Shoe.* However, as this Court has acknowledged in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), a single contact of a nonresidential defendant and a forum is constitutionally sufficient to support personal jurisdiction over that defendant where the cause of action arises, as here, out of defendant's forum activity. In fact, in *Louring v. Kuwait*

Boulder Shipping Co., 445 F.Supp. 630, 633 (D. Conn. 1977), a federal court exercised jurisdiction largely on the absence of an alternative forum to plaintiff, as here. Further, it is difficult to comprehend how the *International Shoe* standard of "fair play and substantial justice" would retain any meaning if due process were a basis for not asserting jurisdiction over Iran for its premeditated attack on the United States through the politically motivated and sponsored attack on an American embassy.

Finally, the Ninth Circuit contends that 28 U.S.C. §1330(b), the long arm statute of the FSIA, is patterned after the District of Columbia statute (*construing* House Report 1487), which does not authorize jurisdiction over out of forum defendants with only isolated contacts within the forum. *McKeel, supra. (Construing Harris v. VAO Intourist Moscow,* 481 F.Supp. 1056, 1061-1065 (E.D.N.Y. 1979) and *Upton v. Empire of Iran*, 459 F.Supp. 264, 265-266 (D.D.C. 1978), *aff'd* mem., 607 F.2d 494 (D.C. Cir. 1979)).

An examination of House Report 1487 at 13 discloses that "the immunity provisions [§ §1605-1607], therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." Thus, whatever the impact of the District of Columbia long arm statute on §1330(b), that section looks to §1605-1607, and not to the District of Columbia long arm statute in meeting due process requirements. Significantly, neither *Harris,* at 1062 nor *Upton* at 266 used the District Columbia long arm statute criteria in denying jurisdiction, relying on absence of direct effect per §1605(a)(2) rather than the isolated forum contact of foreign defendant language of the District of Columbia statute. Sections 1605-1607 do not explicitly preclude jurisdiction over foreign defendants with isolated contacts with the forum.

In any case, both *Harris* and *Upton* are inapposite to the case at bar. In *Harris,* at 1057, the executor of a decedent's estate brought a wrongful death action against a Moscow hotel for a hotel fire killing the decedent. The court found this effect "indirect". *Id.* at 1062. In *Upton,* plaintiffs were injured in Iran when an airport roof collapsed. The *Upton* court at 266 held there was no jurisdiction under §1605(a)(2) for "causing

injury to American citizens abroad . . ." Here, in contrast, the hostages' wives' emotional distress occurred in the United States.

Having reversed itself on jurisdiction over Iran with regard to the hostages' claims, the D.C. Circuit on rehearing by a 2 to 1 vote rejected separately the tort claims of the parents of one of the hostages, Gregory Allen Persinger. The majority found the language of FSIA § 1605(a)(5) ambiguous on whether the tort itself had to occur in United States, *Persinger, on rehearing, supra* at B12, and concluded an examination of congressional intent was necessary to decide the issue. Finding congressional intent and legislative history conclusive on the issue, see *supra* p. 6, the court ruled no jurisdiction.

The petitioner family members in the instant case are Elizabeth Scott and Susan Roeder. The complaint of each includes a cause of action for emotional distress,[12] Excerpt of Record, *McKeel, et al., v. Islamic Republic of Iran and the United States of America,* United States Court of Appeals for the Ninth Circuit, Vol. 1 at 38; Vol. 3 at 633. The contents of the complaints, with references to "enforced detention" and the like, *Id.* at 52 and 647 respectively, strongly suggest the causes are intentional as opposed to negligent infliction of emotional distress. State courts in the Ninth Circuit have recognized the right of a third party to sue for intentional infliction of emotional stress. *Delia S. v. Torres,* 134 Cal.App.3d 471, 484, 184 Cal.Rptr. 787, 795 (1982).[13]

The D.C. Circuit's explicit refusal to find jurisdiction under §1605(a)(5) over Iran for the parents of the hostages centers on the language of §1605(a)(5) reading, "personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state . . ." The refusal is erroneous in light of the arguments expressed herein on behalf

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[12]Each complaint added causes of action for outrage, loss of consortium, declaratory and injunctive relief. *Id.*

[13]The right of a third party action for *negligent* infliction of emotional distress is well established. *E.g. Dillon v. Legg,* 68 Cal.2d 728, 69 Cal. Rptr. 72, 80 (1968).

of the hostages. Assuming *arguendo* the majority is correct in its position that the tort itself, as well as the injury must occur in the United States, petitioners reiterate and incorporate by reference their position as expressed in parts 1-3, *supra.*

Secondly, the premise on which the D.C. Circuit purports to find ambiguity in the relevant language of §1605(a)(5) is faulty. In finding the language unclear on whether the tort and not just the injury must occur in the United States, the majority presumes as a question of fact that the tort occurred in Iran. The infliction component occurred in Iran, but the *sine qua non* of this tort, emotional distress, occurred in the continental United States where the two wives resided. No less an authority than Witkin states that an element of the tort of intentional infliction of emotional distress is severe emotional distress. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, 2515 (8th ed. 1974). Without this element there is no tort. Thus, the tort itself includes the United States. Therefore, even assuming *arguendo* that the statute reads as the majority holds, i.e. the tort must occur in the United States, jurisdiction should issue.

Finally, assuming *arguendo* the tort occurred in Iran, the majority has ignored the plain language of the statute. As Judge Edwards states in his dissent on the specific question of jurisdiction to hear the parents' claims:

> "I find the language of this provision unambiguous and clearly applicable on its face to the parents' claim. In particular, the statute plainly requires that *only the injury,* and not the tortious act or omission, occur in the United States. I see no reason to resort to the legislative history to clarify the plain language of the statute."

Persinger, on rehearing, supra, at B15.

"Although the unambiguous language of the Act makes inquiry almost unnecessary, further examination reveals nothing in its legislative history that contradicts or qualifies its plain meaning." *Letelier, supra,* at 671-672.

The legislative history argument relies on House Report 1487, and as such is subject to the same argument made vis-a-vis the Ninth Circuit, *supra* p. 19.

Referring to the policy arguments, Judge Edwards added, "Congress might easily have determined to give American courts jurisdiction over claims for damages caused by tortious acts or omissions occurring outside the United States only to the extent that those acts or omissions produce effects within the United States." *Id.* at B16. Thus, he did not think it anomalous to allow a family member but not a hostage to recover for the hostages' injuries. *Id.* To the extent there is an anomaly, however, it is one created by the majority's own position in denying jurisdiction on behalf of the hostages. Further, the issue here is jurisdiction, not extent of the wrong. Every tort, no matter how serious, must sustain the jurisdiction issue or be nonsuited. *Id.*, note 12 at B14.

Finally, the argument that because §1605(a)(5) does not contain the "direct effect in the United States" language found in the commercial tort subsection 1605(a)(2),[14] Congress intended to shield noncommercial torts from jurisdiction, has no support in the legislative history. *Persinger on rehearing, supra*, at B16.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14]In point of fact, Iran's seizure may well fall within the commercial tort subsection 1605(a)(2), thus mooting the reasoning in both circuit courts. The Iranians' hostage seizure was "outside the territory of the United States" § 1605(a)(2) at D4. The commercial activities of the Shah, the Pahlavi Foundation and Iran were "commercial activity carried on in the United States by the foreign state," *Id.* or, in the alternative, ". . . (carried on) elsewhere and that act cause[d] a direct effect in the United States." *Id.* The seizure was clearly, as an attempt to retrieve the national monies taken by the Shah and his family, "in connection with a commercial activity, carried on elsewhere. . . " *Id.* Iran has instituted various civil actions in the United States for the commercial purpose of retrieval of national monies, *E.g. Islamic Republic of Iran v. Ashraf Pahlavi,* App. Div., Sup. Ct., First Judicial Dept., No. 18877, slip op. (N.Y. County, April 27, 1984).

APPENDIX

John D. McKEEL, Jr., et al.,
Plaintiffs-Appellants,

v.

The ISLAMIC REPUBLIC OF IRAN and the United States of America,
Defendants-Appellees.

Nos. 82-5111, 82-5114 to 82-5117 and 82-5417.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 7, 1982.
Submission Withdrawn Jan. 31, 1983.
Resubmitted Dec. 28, 1983.
Decided Dec. 30, 1983.

Former hostages and their families brought action against the United States and the Islamic Republic of Iran. The United States District Court for the Central District of California, William P. Gray and Cynthia Holcomb Hall, JJ., dismissed, and plaintiffs appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) court did not have federal question jurisdiction over the action as the only federal questions involved were raised by way of avoidance of defenses; (2) federal diversity jurisdiction does not extend to suits against a foreign state; (3) United States embassy in Iran was not the territory of the United States for purposes of Foreign Sovereign Immunities Act waiver of sovereign immunity with respect to acts occurring in the United States; and (4) claim that the Claims Settlement Agreement was an unconstitutional taking of hostages' property was within the jurisdiction of the Claims Court.

Affirmed.

APPENDIX A

1. Federal Courts Key No. 192, 275

Statutes giving federal courts jurisdiction over questions arising under federal law and over suits between citizens of a state and citizens of a foreign state did not confer subject-matter jurisdiction on federal district court to hear suit brought against the Islamic Republic of Iran. 28 U.S.C.A. §§ 1331, 1332.

2. Federal Courts Key No. 242

Case arises under federal law if the federal law issue is presented as a matter of sound pleading in the complaint; it is not satisfied when the federal question is merely an assertion that federal law deprives the defendant of a defense. 28 U.S.C.A. § 1331.

3. Federal Courts Key No. 243

Allegations of former hostages that the Foreign Sovereign Immunities Act waived the Republic of Iran's immunity from suit did not provide basis for exercise of federal question jurisdiction over suit against the Republic of Iran. 28 U.S.C.A. §§ 1331(a), 1331.

4. Federal Courts Key No. 243

Request for declaratory judgment that former hostages were not barred by various executive agreements from suing Republic of Iran for injuries which they suffered while being held hostage did not provide basis for exercise of federal question jurisdiction as it was merely an allegation that federal law deprived Iran of a defense. 28 U.S.C.A. § 1331.

5. International Law Key No. 10.33

Jurisdiction over foreign states and their instrumentalities as defendants can be obtained only under the Foreign Sovereign Immunities Act. 28 U.S.C.A. §§ 1330(a), 1332(a)(2).

6. Federal Courts Key No. 275

Diversity jurisdiction statute does not provide for district court jurisdiction over a foreign state defendant. 28 U.S.C.A. § 1332.

7. International Law Key No. 10.33

Events occurring at United States embassy in Iran did not fall within the Foreign Sovereign Immunities Act's waiver of

immunity for acts occurring in the United States. 28 U.S.C.A. § § 1330(a), 1603(c), 1605(a)(2).

8. International Law Key No. 10.33

Congress intended that the Foreign Sovereign Immunities Act make United States law on sovereign immunity consistent with international law. 28 U.S.C.A. § 1330.

9. International Law Key No. 10.33

Under the restrictive principle of sovereign immunity codified in the Foreign Sovereign Immunities Act, immunity of a foreign state is restricted to suits involving a foreign state's public acts, "jure imperii," and does not extend to suits based on its commercial or private acts, "jure gestionis."

See publication Words and Phrases for other judicial constructions and definitions.

10. International Law Key No. 5

Territory is a primary basis for jurisdiction and a state may prescribe and enforce a rule of law for conduct occurring in territory under that state's sovereignty.

11. Ambassadors and Consuls Key No. 3

United States embassy remains the territory of the receiving state and does not constitute territory of the United States.

12. Ambassadors and Consuls Key No. 3

United States embassies are not within the territorial jurisdiction of the United States.

13. International Law Key No. 7

State may punish the wrongful conduct of its citizens no matter where it takes place.

14. International Law Key No. 7

Under the protective principle of territory, certain crimes against the sovereignty of a state may be punished regardless of the nationality of the actor or the location of the act.

15. Ambassadors and Consuls Key No. 3

Nationality and protective principle allow the United States to assert jurisdiction over individuals for events occurring at United States embassies and consulates.

16. International Law Key No. 10.33

For purposes of Foreign Sovereign Immunities Act's waiver of sovereign immunity with respect to acts occurring within the territory subject to the jurisdiction of the United States, phrase "territory * * * subject to the jurisdiction of the United States" refers to areas subject to the territorial jurisdiction of the United States. 28 U.S.C.A. § § 1330(a), 1605.

17. International Law Key No. 10.33

Foreign Sovereign Immunities Act merges the questions of subject-matter and personal jurisdiction. 28 U.S.C.A. § 1330(a).

18. International Law Key No. 10.33

Federal court could not exercise personal jurisdiction over Islamic Republic of Iran with respect to actions taking place in Iran which allegedly caused injury in the United States to families of hostages. 28 U.S.C.A. § 1330(b).

19. Federal Courts Key No. 1139

Because plaintiffs each claimed at least $5 million, there was no jurisdiction in the district court with respect to claims against the United States so that the district court could not consider whether certain conduct on the part of the United States gave rise to a taking without just compensation. 28 U.S.C.A. § 1491.

20. Eminent Domain Key No. 2

Federal court may not invalidate a governmental action under the taking clause if, at the time of the alleged taking, there was a reasonable, certain and adequate provision for obtaining compensation.

21. Eminent Domain Key No. 2(1.1)

The availability of redress in the Claims Court for former hostages in Iran satisfies constitutional requirement of adequate provision for compensation so that the claims settlement agreement does not unconstitutionally take property rights of the hostages.

22. Federal Courts Key No. 1078

Claims Court has the authority to issue declaratory judgment where a declaratory relief is tied and subordinate to a monetary award.

23. Federal Courts Key No. 1153

Where case could not originally have been brought in the Claims Court because plaintiffs sought only declaratory relief and did not plead money damages against the United States and where statute of limitations on such a claim had not yet run, Court of Appeals which found that federal district court was without jurisdiction would not transfer case to the Claims Court.

James H. Davis, Los Angeles, Cal., for plaintiffs-appellants.

Michael F. Hertz, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before SNEED and SKOPIL, Circuit Judges, and INGRAM*, District Judge.

SNEED, Circuit Judge:

On November 4, 1979, Iranian militants seized the diplomatic and military personnel attached to the United States Embassy in Tehran. The Americans were held hostage in violation of international law for over fourteen months. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran),* 1980 I.C.J. 3; see also *Dames & Moore v. Regan*, 453 U.S. 654, 662-66, 101 S.Ct. 2972, 2977-79, 69 L.Ed.2d 918 (1981) (discussing agreement between United States and Iran that led to release of the hostages).

This action was brought by twelve former hostages and by wives of two ex-hostages. Plaintiffs seek redress in tort against Iran for damages suffered during and as a result of their Iranian captivity, as well as declaratory relief against the United States. Plaintiffs base their allegation of subject matter jurisdiction over Iran on 28 U.S.C. § § 1331 and 1332, and on the

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*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330(a), and over the United States on 28 U.S.C. § § 1331 and 1361.

The claims of thirteen of the plaintiffs were consolidated before Judge Gray of the District Court for the Central District of California, and Judge Hall of that district heard the fourteenth case. Both judges granted the motion of the United States, appellee here, to dismiss for lack of subject matter jurisdiction, and for failure to state a claim on which relief could be granted.[1]

We affirm the district court's dismissal of the actions for lack of subject matter jurisdiction.[2] In addition, we reject appellants' suggestion that we remand this case to determine whether the executive agreements negotiated by the President to obtain the hostages' release constitute a valid claim against the United States for a "taking" of property without just compensation, because the proper forum to adjudicate that issue is the United States Claims Court. Finally, we deny appellants' motion to transfer this case to that court.

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1. Defendant, the Islamic Republic of Iran, was represented in the district court by counsel, but did not defend the action, leaving that task to the United States.

2. *Persinger v. Islamic Republic of Iran,* No. 81-2003 (D.C.Cir., Oct. 8, 1982), involves issues similar to those presented here. In *Persinger,* the Court of Appeals for the District of Columbia held that the FSIA gave the district court jurisdiction for a suit by an ex-hostage against Iran for torts committed during the seizure of the United States embassy. The court further held that the suit was precluded by the executive agreements negotiated by President Carter to secure the release of the hostages. *Williams v. Iran,* 692 F.2d 151 (C.C.Cir. 1982) and *Lauterbach v. Iran*, 692 F.2d 150 (D.C.Cir. 1982) followed the original decision in *Persinger.*

   The Court of Appeals for the District of Columbia subsequently withdrew its opinion in *Persinger* and granted the motion of the United States for a rehearing on the jurisdictional issue. Two cases against the United States by former hostages seeking compensation for preclusion of their claims against Iran are pending in the United States Claims Court. *Cooke v. United States,* No. 581-82C; *Amburn v. United States*, No. 564-82C.

I.

JURISDICTION OVER IRAN

Appellants assert federal question and diversity jurisdiction over the Islamic Republic of Iran, 28 U.S.C. §§ 1331 and 1332, as well as jurisdiction derived from the Foreign Sovereign Immunities Act, *id.* § 1330(a). We hold that there is no basis under sections 1331 and 1332 or the FSIA for jurisdiction over Iran.

A. *Federal Question and Diversity Jurisdiction*

[1] Congress has the power through the Arising Under and Diversity Clauses of Article III of the Constitution to confer jurisdiction on the federal courts to hear suits such as the present one, where United States citizens seek redress against a foreign state defendant. *Verlinden B.V. v. Central Bank of Nigeria*, ____ U.S. ____, 103 S.Ct. 1962, 1970 n. 18, 1973, 76 L.Ed.2d 81 (1983). However, it has not done so by enacting 28 U.S.C. §§ 1331 and 1332. These sections do not provide a basis for jurisdiction over Iran. Congress has vested exclusive jurisdiction over suits against foreign state defendants in the FSIA.

1. *Section 1331*

[2] Although section 1331 grants district courts federal question jurisdiction over all cases "arising under" federal law, *cf. Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 739, 6 L.Ed. 204 (1824), the scope of this *statutory* "arising under" jurisdiction is limited by the well-pleaded complaint rule. This rule provides that a case arises under federal law for the purposes of section 1331 if the federal law issue must be presented as a matter of sound pleading in the complaint. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). It is not satisfied when the federal question is merely an assertion "that federal law deprives the defendant of a defense he may raise . . ., or that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, ____ U.S. ____, 103 S.Ct. 2841, 2846-47, 77 L.Ed.2d 420 (1983).

[3, 4] The federal question presented by appellants here is such an assertion. Appellants assert that the FSIA waives Iran's immunity from suit. The FSIA, however, does not affect the substantive law of liability. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, ____ U.S. ____, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983). That liability—were a court to reach the merits of appellants' claims—would be determined by state or Iranian law. It follows that the appellants' allegation that the FSIA deprives Iran of a sovereign immunity defense to this action does not constitute a well-pleaded complaint under section 1331, *Franchise Tax Board*, 103 S.Ct. at 2846-47, and therefore does not provide a basis for statutory "arising under" jurisdiction.[3] *Cf. Ruggiero v. Compania Peruane de Vapores*, 639 F.2d 872, 876 (2d Cir.1981); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 545-48 (D.D.C.1981).

2. *Section 1332*

[5, 6] Section 1332(a)(2) presently gives the district courts jurisdiction over civil actions between "citizens of a State and citizens or subjects of a foreign state." Before the adoption of

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3. Appellants also seek a declaratory judgment that they are not barred by several executive agreements from suing Iran for the injuries they suffered while being held hostage. This too is an assertion that federal law deprives the defendant of a defense, and thus does not meet the requirements of the well-pleaded complaint rule. *See Franchise Tax Board*, 103 S.Ct. at 2846-47.

Shaw v. Delta Airlines, Inc., ____ U.S. ____, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) does not govern the jurisdictional issue in this case. The Court held in *Shaw* that a plaintiff who seeks to enjoin state action based on a claim of federal preemption satisfies the well-pleaded complaint rule. *Id.* 103 S.Ct. at 2899. n. 14. This holding recognizes the long-standing rule that federal courts have jurisdiction to enjoin state officials from interfering with federal rights. *Id.* (citing *Ex Parte Young*, 209 U.S. 123, 160-62, 28 S.Ct. 441, 454-55, 52 L.Ed. 714 (1908)). *Shaw*, however, does not suggest that the well-pleaded complaint rule is satisfied by a claim that federal law deprives the defendant of a possible defense. *Cf. Franchise Tax Board*, 103 S.Ct. at 2851-53 (no federal jurisdiction over suit by state seeking declaration that state action is not preempted by federal law).

the FSIA, section 1332(a)(2) also extended district court jurisdiction to suits between "citizens of a State and foreign states." 62 Stat. 869, 930 (1948). However, Congress, as part of the FSIA, removed this jurisdiction from section 1332, and placed it in a new section, 1330.[4] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* 1976 U.S.Code Cong. & Ad.News 6604, 6613. Moreover, the legislative history of the FSIA notes that section 1330 was enacted to promote "uniformity in decision," *id.* at 13, 1976 U.S.Code Cong. & Ad.News at 6611, and implies that jurisdiction over foreign states and their instrumentalities as defendants can only be obtained under the FSIA. Indeed, every appellate court to address the issue has so held. *See Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420-22 (5th Cir. 1982); *Rex v. Compania Pervana de Vapores*, 660 F.2d 61, 65 (3d Cir. 1981) *cert. denied,* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 880-81 (4th Cir. 1981) *cert. denied,* 445 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982); *Ruggiero*, 639 F.2d at 875-76; *see also Verlinden B.V. v. Central Bank of Nigeria*, 103 S.Ct. at 1971, 1973 (dictum). We agree, and hold that section 1332 no longer provides for district jurisdiction over a foreign state defendant, and that if appellants are to obtain jurisdiction in this case over Iran, it must be through the FSIA. *See Goar,* 688 F.2d at 420-22.

B. *Foreign Sovereign Immunities Act Jurisdiction*

28 U.S.C. § 1330(a) states that district court jurisdiction over claims against foreign state defendants is limited to cases in "which the foreign state is not entitled to immunity either under sections 1605-1607 of . . . title [28] or under any applicable international agreement." The district court examined the relevant passages of the FSIA, and found that sovereign immunity barred suit against Iran. We affirm.

Under the FSIA, sovereign immunity is waived in suits "for money damages . . . against a foreign state for personal injury or

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4. There is still § 1332 jurisdiction over diversity suits involving foreign state plaintiffs. 28 U.S.C. § 1332(a)(4).

death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state . . . " 28 U.S.C. § 1605(a)(5) (emphasis added). 28 U.S.C. § 1603(c) defines "the United States" for purposes of the FSIA to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States."

[7] This brings us to the heart of this case. Appellants argue that section 1603(c) should be interpreted to embrace "all territory and waters" with respect to which the United States exercises any form of jurisdiction. Inasmuch as United States embassies are subject to the jurisdiction of the United States for certain purposes, appellants argue that events occurring at the embassies fall within the waiver of immunity contained in section 1605(a)(5). Although a literal reading of the statute supports this argument, we decline to accept it because we believe the intent of Congress was to the contrary. *Cf. United States v. American Trucking Ass'ns,* 310 U.S. 534, 543-44, 60 S.Ct. 1059, 1063-64, 84 L.Ed. 1345 (1940); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 866 (9th Cir.) *cert. denied,* ____ U.S. ____, 104 S.Ct. 149, 78 L.Ed.2d ____ (1983).

[8, 9] Our view rests on the proposition that Congress intended that the FSIA would make United States law on sovereign immunity consistent with international law. *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria* 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982); H.R. Rep. No. 1487, *supra*, at 7, 1976 U.S.Code Cong. & Ad.News at 6605-06.[5] Consistent with that intent section 1604 provides a general jurisdictional immunity for foreign states which is made subject to the exceptions specified in section 1605.[6] Section 1605(a)(5),

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5. *See also* S.Rep. No. 1310, 94th Cong., 2d Sess. 9, 11 (1976); 122 Cong.Rec. 33532 (1976) (statement of Rep. Danielson); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 29 (remarks of Bruno Ristau, U.S. Dep't of Justice); *id.* at 33 (remarks of Monroe Leigh, U.S. Dep't of State).

6. The FSIA codifies the "restrictive" principle of sovereign immunity as recognized in international law. Under this principle, the

the exception for noncommercial torts on which appellants rely, is directed primarily at the problem of traffic accidents in the United States caused by automobiles operated by a foreign embassy. The legislative history makes this clear. *See* H.R.Rep. No. 1487, *supra*, at 7, 20-21, 1976 U.S.Code Cong. & Ad.News at 6605-06, 6618-20. Admittedly section 1605(a)(5) is cast in general terms, and with certain exceptions, includes all tort actions for money damages not encompassed by the commercial activity exception in section 1605(a)(2). *See* H.R.Rep. No. 1487, *supra*, at 20-21, 1976 U.S.Code Cong. & Ad.News at 6619. However, nothing in the legislative history suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory. Such an intent would not be consistent with the prevailing practice in international law. That practice is that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state. *See, e.g.*, European Convention on State Immunity, Arts. 7, 11, Council of Europe, No. 74 (1972); State Immunity Act, 1979, pt. 2, § 7 (Singapore); State Immunity Act, 1978, ch. 33, § 5 (U.K.).

[10-12] Informed as we must be by that practice the issue before us is whether the embassy in Tehran is "territory . . . subject to the jurisdiction of the United States." Appellants contend that it is. Territory, of course, is a primary basis for jurisdiction, *i.e.*, a state may prescribe and enforce a rule of law for conduct occurring in territory under the state's sovereignty. Restatement (Second) of the Foreign Relations Law of the United States §§ 10, 17, 20 (1965) [hereinafter cited as Restatement (Second)].[7] A United States embassy, however,

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immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). H.R. Rep. No. 1487, *supra*, at 7, 1976 U.S.Code Cong. & Ad.News at 6605-06.

7. The doctrine of sovereign immunity has been explained as an implied waiver by the domestic state of its exercise of territorial jurisdiction in regard to a foreign sovereign. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137, 147, 3 L.Ed. 287 (1812). *See generally* Von Mehren *The Foreign Sovereign Immunities Act of 1976.* 17 Colum.J. Transnat'l L. 33 (1978) (discussing background of FSIA).

remains the territory of the receiving state, and does not constitute territory of the United States. Restatement (Second) § 77 comment a. Thus, United States embassies are not within the territorial jurisdiction of the United States. *See Meridith v. United States*, 330 F.2d 9, 10-11 (9th Cir.), *cert. denied*, 379 U.S. 867, 85 S.Ct. 137, 13 L.Ed.2d 70 (1964).

[13-15] This is sufficient to dispose of appellants' contention. They argue, however, that United States embassies are "territory" subject to the jurisdiction of the United States on other grounds. Two such grounds are nationality and the protective principle. A state, for example, may punish the wrongful conduct of its citizens, no matter where it takes place. *E.g., Skiriotes v. Florida*, 313 U.S. 69, 73, 61 S.Ct. 924, 927, 85 L.Ed. 1193 (1941); Restatement (Second) § 30. The protective principle, on the other hand, provides that certain crimes against the sovereignty of a state may be punished regardless of the nationality of the actor or the location of the act. *E.g., United States v. Columbia-Colella*, 604 F.2d 356, 358 (5th Cir. 1979) (dictum); *Rocha v. United States,* 288 F.2d 545 (9th Cir. 1961), Restatement (Second) § 33. Nationality and the protective principle do allow the United States to assert jurisdiction over *individuals* for events occurring at United States embassies and consulates. *E.g., Agee v. Muskie*, 629 F.2d 80, 111 (D.C.Cir.) (United States embassy is under concurrent jurisdiction of United States criminal laws), *rev'd on other grounds sub nom. Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1980); *United States v. Erdos*, 474 F.2d 157, 159-60 (4th Cir.)(same), *cert. denied*, 414 U.S. 876, 94 S.Ct. 42, 38 L.Ed.2d 122 (1973); *Rocha*, 288 F.2d at 548-49.

Appellants claim that *United States v. Erdos* establishes that embassies are subject to the jurisdiction of the United States for purposes of the FSIA with the result that jurisdiction exists for their suit against the *nation* of Iran. We disagree. In *Erdos*, a United States diplomat killed a fellow citizen within a United States embassy. 474 F.2d at 159. Jurisdiction for the prosecution of Erdos upon his return to the United States was based on 18 U.S.C. § 7, which grants special territorial jurisdiction over

federal crimes committed in United States embassies.[8] 474 F.2d at 159-60. *Erdos* is not controlling because it involved the exercise of jurisdiction over a United States citizen pursuant to an explicit statutory mandate. In contrast, here we are urged to assert jurisdiction over a foreign sovereign for events occurring within its own territory.[9] Moreover, the definition of jurisdiction under 18 U.S.C. § 7 is only for purpose of the title dealing with federal crimes, *see Perez v. The Bahamas*, 652 F.2d 186, 189 (D.C.Cir.), *cert. denied*, 454 U.S. 865, 102 S.Ct. 326, 70 L.Ed.2d 166 (1981), and it therefore does not determine whether United States embassies are subject to the jurisdiction of the United States within the meaning of the FSIA.

To interpret section 1603(c) as urged by appellants would represent a fundamental change in the prevailing international practice with respect to sovereign immunity. Under that practice assertions of jurisdiction based on nationality or the protective principle are not limited by the extent of a state's territory. If these bases of jurisdiction extended the "United States," as that term is used in section 1603(c), to any place at which they possibly could support jurisdiction, the FSIA would have almost unlimited geographic scope. Such an unprecedented assertion of jurisdiction against *foreign states* could interfere

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8. 18 U.S.C. § 7 provides in pertinent part:
The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:
(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

9. We also believe that *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936, 88 S.Ct. 2306, 20 L.Ed.2d 1395 (1968) is distinguishable from the present case. In *Pizzarusso*, a Canadian citizen who knowingly made a false oath at an American consulate was arrested upon entry into the United States and prosecuted. The power of the United States to proscribe conduct occuring at the consulate in Canada derived from the protective principle. *See id.* at 9-10. We do not think this case suggests that the FSIA provides jurisdiction of a foreign state for events occurring in that state's own territory.

with the conduct of our foreign policy and impair relations between the United States and other governments. For example, were we to uphold jurisdiction here, and a Greek mail truck were to injure an American serviceman on a United States Army base in Greece, the American could sue the Greek government in the United States. Moreover, under the principle of reciprocity, *see* 6 M. Whiteman, *Digest of International Law* 580-82 (1968), the United States could become subject to foreign jurisdiction for torts committed by its agents and employees at foreign embassies in the United States.

[16-18] We conclude that the phrase "territory . . . subject to the jurisdiction of the United States" refers to areas subject to the territorial jurisdiction of the United States. The general rule is that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *see also Meridith*, 330 F.2d at 11. Because United States embassies are not subject to the territorial jurisdiction of the United States, the district court correctly held that the FSIA does not provide jurisdiction over Iran in this case.[10]

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10. The claims of family members fare no better than the claims of the hostages themselves. The FSIA merges the questions of subject matter and personal jurisdiction. 28 U.S.C. § 1330(a) provides statutory subject matter jurisdiction against a foreign state for nonjury civil actions in which the foreign state is not entitled to immunity under §§ 1603-07. 28 U.S.C. § 1330(b) provides that personal jurisdiction is satisfied if the court has subject matter jurisdiction under § 1330(a) and there has been service of process pursuant to § 1608.

Congress intended that the immunity provisions which establish subject matter jurisdiction would also prescribe the necessary contacts that must exist for courts to exercise personal jurisdiction. H.R.Rep. No. 1487, *supra*, at 13, 1976 U.S.Code Cong. & Ad.News at 6612. Consequently, in defining the contours of § 1605(a)(5), we are sensitive to the constitutional requirement that minimum contacts must exist for the assertion of jurisdiction against a foreign sovereign. *See Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 & n. 18, 1108 & n. 20 (D.C.Cir. 1982) (although immunity and

II.

TAKING CLAIM

[19] Appellants argue that if we affirm the dismissal of their claims on the merits—as we have done—we should remand this case to the district court to determine whether the Claims Settlement Agreement gives rise to a valid claim against the United States for a taking of property without just compensation. We are unable to remand this case, however, because the district court lacks jurisdiction to hear appellants' taking claim.

There is district court jurisdiction for civil actions against the United States, such as a taking claim, only if the damages sought do not exceed $10,000. 28 U.S.C. § 1346(a)(2).

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personal jurisdiction are separate determinations, considerations related to personal jurisdiction are relevant to defining scope of immunity under § 1605(a)(2)), *cert. denied*, ___ U.S. ___, 104 S.Ct. 71, 78 L.Ed.2d ___ (1983).

Congress patterned § 1330(b) on the longarm statute for the District of Columbia. H.R.Rep. No. 1487, *supra*, at 13, 1976 U.S.Code Cong. & Ad.News at 6612. That statute does not authorize jurisdiction when the only contact with the forum is an injurious consequence of an out-of-state act or omission. *See, e.g., Harris v. VAO Intourist Moscow*, 481 F.Supp. 1056, 1061-65 (E.D.N.Y. 1979); *Upton v. Empire of Iran*, 459 F.Supp. 264, 265-66 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C.Cir. 1979). We conclude that the FSIA does not provide jurisdiction over the claims of the family members in this case.

We need not decide whether § 1605(a)(5) may ever provide jurisdiction for tort actions in which the tortious act or omission occurs outside the United States. The language of § 1605(a)(5) suggests that only the injury need occur in the United States, but the legislative history declares that, "the tortious act or omission must occur within the jurisdiction of the United States." H.R.Rep. No. 1487, *supra*, at 21, 1976 U.S.Code Cong. & Ad.News at 6619. Judicial decisions reflect similar disagreement. *Compare Frolova v. Union of Soviet Socialist Republics*, 558 F.Supp. 358, 362 (N.D.Ill.1983) (act or omission must occur in the United States *and in re Sedco, Inc.* 543 F.Supp. 561, 567 (S.D.Tex.1982) *with Letelier v. Republic of Chile*, 488 F.Supp. 665, 674 (D.D.C.1980) (only tortious injury need occur in the United States).

Because appellants contend that each claim against Iran amounts to at least $5,000,000, E.R. at 32-33, jurisdiction would not lie with the district court, but with the United States Claims Court, 28 U.S.C. § 1491. *See Dames & Moore,* 453 U.S. at 689-90, 101 S.Ct. at 2991-92.

Appellants seek to avoid this conclusion by arguing that they are not seeking damages because of a taking, but only a declaratory judgment that the Claims Settlement Agreement is invalid because it took appellants' property rights. Thus, appellants contend, the district courts should have had jurisdiction under 28 U.S.C. §§ 1331 and 2201 to award the requested relief. Appellants' argument is without merit.

[20,21] First, appellants are mistaken in their assumption that acceptance of their taking claim would invalidate Executive Order 12283. A federal court may not invalidate a governmental action under the Taking Clause if at the time of the alleged taking, there was a "reasonable, certain and adequate provision for obtaining compensation." *Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890); see Dames & Moore,* 453 U.S. at 689, 101 S.Ct. at 2991. That little or no compensation to the hostages from Congress has actually been forthcoming is irrelevant, since the availability of redress in the Claims Court satisfies the constitutional requirement of an adequate provision for compensation. *See Regional Rail Reorganization Act Cases,* 419 U.S. 102, 122-36, 95 S.Ct. 335, 348-55, 42 L.Ed.2d 320 (1974).

Second, the Claims Court's jurisdiction cannot be avoided by a complaint that appears to seek only equitable relief when the real effort of the complaining party is to obtain damages in excess of $10,000 from the federal government. *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981). That is the object of the appellants. The only value to appellants of the declaratory judgment they seek would be to have it serve as res judicata in the Claims Court.

[22] Finally, the Claims Court does have the authority to issue a declaratory judgment where, as in the present case, declaratory relief is tied and subordinate to a monetary award. *See Rowe v. United States,* 633 F.2d 799, 802 (9th Cir. 1980),

cert. denied, 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 849 (1981). Thus the Claims Court is the proper forum to award appellants relief for any taking of their property rights.

III.

TRANSFER TO CLAIMS COURT

Appellants have requested us to transfer their taking claim to the United States Claims Court. While we prabably have the authority to make such a transfer under 28 U.S.C. § 1631, *see Hempstead County and Nevada County Project v. United States Environmental Protection Agency*, 700 F.2d 459, 462-63 (8th Cir.1983), we decline to do so here.

[23] Section 1631 provides that a transfer of an action or appeal shall be made "to any such court in which the action or appeal could have been brought at the time it was filed" if the transfer "is in the interest of justice." *See Campbell v. Office of Personal Management*, 694 F.2d 305, 309 n. 6 (3d Cir.1982). As we note above, this case could not originally have been brought in the Claims Court, since appellants only seek declaratory relief, and do not plead money damages against the United States. Moreover, a transfer is not necessary to advance the interest of justice. The statute of limitations on appellants' taking claim has not yet run. 28 U.S.C. § 2501. Appellants therefore can refile in the United States Claims Court without penalty, should they choose to do so.

AFFIRMED.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2003

GREGORY ALLEN PERSINGER, et al., APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-00230)

On Petition for Rehearing

Argued May 19, 1983

Decided March 13, 1984

Michael F. Hertz, Department of Justice, with whom *J. Paul McGrath,* Assistant Attorney General, *Stanley S. Harris,* United States Attorney (at the time the brief was filed), *Robert E. Kopp,* Attorney, Department of Justice, and *Jonathan B. Schwartz*, Attorney, Department of State, were on the brief for appellee, United States. *Theodore C. Hirt*, Attorney, Department of State, were on the brief for appellee, United States. *Theodore C. Hirt*, Attorney, Department of Justice also entered an appearance for United States.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Brice M. Clagett with whom *Paul G. Gaston* and *Harold Hongju Koh* were on the brief for *amicus curiae*, FLAG, Inc., opposing modification of original opinion.

Peter J. Neeson, of the Bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of the Court, with whom *Mark H. Tuohey, III,* was on the brief, for appellants.

Thomas G. Shack, Jr. and *Thomas D. Silverstein* entered appearances for appellee, Islamic Republic of Iran.

Before: EDWARDS and BORK, *Circuit Judges,* and BAZELON, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge BORK.*

Opinion dissenting in part and concurring in part filed by *Circuit Judge* EDWARDS.

BORK, *Circuit Judge:* This is an action for damages against the Islamic Republic of Iran for injuries inflicted by the seizure and detention of American hostages. Appellants, plaintiffs below, are a former hostage and his parents. On October 8, 1982, we issued an opinion affirming the district court's dismissal of appellants' claims. There, we held the defense of sovereign immunity inapplicable but decided that appellants had failed to state a claim upon which relief could be granted. Specifically, we held that the executive order signed by President Carter, pursuant to an agreement with Iran to secure the release of the hostages, lawfully and effectively extinguished appellants' claims against Iran.

Though the United States, which had intervened as a party-defendant in order to meet its obligations under the executive agreement with Iran, *see American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 433 (D.C. Cir. 1981), prevailed, the government was sufficiently concerned about our ruling on the question of sovereign immunity to petition the panel for rehearing on that issue. We granted the petition, and now affirm the judgment of the district court on that court's alternate ground: Iran enjoys sovereign immunity and that immunity has not been lifted for the acts involved here by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* (1976) ("FSIA" or "Act"). This conclusion also requires that we vacate our prior opinion.

I.

Gregory Allen Persinger is a United States Marine, who, on November 4, 1979, was stationed at the United States Embassy in Tehran, Iran. On that date, the Embassy was seized by Iranian militants, and the Embassy's personnel, including Sergeant Persinger, were captured and held hostage. This act, which was not merely hostile to the United States but unprecedented in the history of international relations, at once created a crisis between the United States and Iran. The United States tried to secure the release of the hostages through a series of stringent retaliatory measures, but all such efforts failed.[1]

Ultimately, the United States was able to obtain the hostages' freedom only by an executive agreement with Iran that necessarily made concessions to that country. Since diplomatic relations with Iran had been severed, the agreement was embodied in two Declarations of the Government of Algeria, initialed for the United States by Deputy Secretary of State Warren M. Christopher on January 19, 1981. The hostages, including Sergeant Persinger, were released the following day, having been held captive for almost fifteen months.[2]

Sergeant Persinger and his parents brought suit in the district court against the Islamic Republic of Iran on February 2, 1981, alleging numerous violations of treaties and of international, constitutional, and common law. The United States moved to dismiss the complaint. After a hearing, District Judge Oberdorfer granted the government's motion. *Persinger v. Islamic Republic of Iran,* Civ. No. 81-00230 (D.D.C. Aug. 21, 1981).

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[1]The President declared a national emergency and issued an executive order blocking Iran's threatened removal or transfer of all Iranian assets in this country. The United States and other nations imposed trade sanctions upon Iran. The United States took its case to the International Court of Justice at the Hague, which declared Iran's actions to be in violation of international law. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in* 19 I.L.M. 553 (1980). Finally, the United States attempted a military rescue operation that cost several American lives.

[2]The executive agreement purported to extinguish all hostage claims against Iran but the effectiveness of that extinguishment need not be decided since Iran, in any event, is immune from this tort action.

Relying on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the district court held that "the President may dispose of private claims against foreign states to resolve, or avoid, international crises." *Persinger v. Islamic Republic of Iran*, slip op. at 2. (In *Dames & Moore,* the Supreme Court upheld the legality of a different executive order issued as part of the effort to carry out the Algerian Declaration.) The district court held, in the alternative, that even in the absence of a valid executive order, Iran would be immune under the Foreign Sovereign Immunities Act from suit for tortious acts in the United States Embassy in Tehran. This appeal followed.[3]

II.

A.

In its initial submissions, the government contended that we need not reach the issue of Iran's sovereign immunity—and of this court's jurisdiction—if we decide that President Carter had the power lawfully to extinguish the Persingers' claims. Brief for the United States at 22. We disagree. The Act expressly deprives a court of jurisdiction over any party entitled to sovereign immunity. 28 U.S.C. § 1604 (1976) ("[A] foreign

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[3]In Williams v. Iran, No. 81-1672 (D.C. Cir. Oct. 19, 1982), and Lauterbach v. Iran, No. 81-1676 (D.C. Cir. Oct. 19, 1982), this Court affirmed lower court judgments dismissing plaintiffs' claims against Iran "for the reasons stated in *Persinger v. Islamic Republic of Iran*, No. 81-2003, decided by this Court on October 8, 1982." *See also* Moeller v. Islamic Republic of Iran, No. 80-1171 (D.D.C. Aug. 5, 1981) (no appeal taken). Between the date on which we heard oral argument on this petition, and today the Ninth Circuit considered the same issue that is before us, McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), and concluded, as we do, that sovereign immunity bars appellants' suits from going forward. *Id.* at 589. We refer to that opinion where appropriate.

Currently, two cases against the United States by former hostages seeking compensation for extinguishment of their claims against Iran are pending in the United States Claims Court. Cooke v. United States, No. 581-82C (Ct. Cl.); Amburn-Lijek v. United States, No. 564-82C (Ct.Cl.). The Claims Court has stayed its consideration of the merits of the hostages' claims in both *Cooke* and *Amburn-Lijek* pending the disposition of the rehearing in this case. Cooke v. United States, No. 581-82C (Ct. Cl. Mar. 3, 1983) (denying motion for class certification).

state shall be immune *from the jurisdiction of the courts* of the United States . . . .") (emphasis added); *see Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 306-07 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *cf. Tuck v. Pan American Health Organization*, 668 F.2d 547, 549 (D.C. Cir. 1981) (immunity issue must be addressed before merits). Since we decide that in this case Iran is not subject to this court's jurisdiction, it would be improper for us to reach the question of the President's authority over these claims.[4] To exceed the jurisdictional limits of a court's power is to exercise authority illegitimately, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). For that reason we decide jurisdiction first, and our conclusion that jurisdiction is absent means that we cannot let our prior opinion on the merits stand.

Foreign states are generally immune from the jurisdiction of federal and state courts. 28 U.S.C. § 1604. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The FSIA, however, creates a number of exceptions to this immunity. 28 U.S.C. § 1605. One exception provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
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> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;. . . .

28 U.S.C. § 1605(a) (5). The "United States" is defined to include "all territory and waters, *continental or insular*, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c) (emphasis added). Thus, if a foreign state's "act[s] or omission[s]" cause tortious injury within the United States,

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[4]That precept is embodied in Fed. R. Civ. P. 12(h)(3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

as defined in section 1603(c), the foreign state's immunity is is abrogated, subject to the exceptions set out in section 1605(a)(5), and there can be both subject matter and personal jurisdiction in United States courts. 28 U.S.C. § 1330(a), (b).

That Congress has the power to exercise jurisdiction over certain activities at U.S. embassies abroad is not disputed. *Agee v. Muskie*, 629 F.2d 80, 111 (D.C. Cir.) (MacKinnon, J., dissenting) (United States embassy is under concurrent jurisdiction of United States criminal laws), *rev'd on other grounds sub nom. Haig v. Agee,* 453 U.S. 280 (1980); *see also* Brief for the United States at 22-23.[5] The issue before this court, then, is whether Congress, in enacting the FSIA, intended to exercise its jurisdiction to give courts in this country competence to hear suits against foreign states for torts committed on United States embassy premises abroad. That issue turns upon the question whether United States embassies are within the definition of "United States" set forth in section 1603(c). The government contends that the FSIA was intended to abrogate sovereign immunity only for torts within the exclusive territorial jurisdiction of the United States.[6] It is contended, on the other side, that since embassies are "substantially removed from the jurisdiction of the receiving state," Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 7,[7] and are subject to the concurrent jurisdiction of

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[5]The government maintains that subjecting a foreign state to jurisdiction for acts on United States embassy premises abroad "might well create a serious danger of conflict with the Fifth Amendment due process clause." Brief for the United States on Rehearing at 10. Since we hold that Congress did not intend to exercise jurisdiction in a case such as this one, we need not reach the question of Congress' constitutional power to exercise such jurisdiction.

[6]This is the conclusion that, except for this Court's initial determination, every other court which considered the question has reached. *See* McKeel v. Iran, 722 F.2d 582 (9th Cir. 1983); Persinger v. Iran, No. 81-00230 (D.D.C. Aug. 21, 1981); Moeller v. Iran, No. 80-1171 (D.D.C. Aug. 5, 1981); Lauterbach v. Iran, No. 81-0350 (D.D.C. June 11, 1981); Williams v. Iran, No. 79-3295 (D.D.C. 1981).

[7]Sergeant Persinger and his parents, plaintiffs below, have, in this rehearing, substantially deferred to counsel for FLAG, Inc. They have stated to this court that "with regard to the issues presently

both sending and receiving states, Iran is not shielded by sovereign immunity from liability for torts at the United States Embassy in Tehran, Iran. *Id.* We are persuaded by the language of the statute, its legislative history, and by the consequences of adopting a contrary position that section 1605(a) (5) does not remove Iran's immunity here.

In section 1603(c), Congress used the words "continental or insular" to modify the scope of the phrase "all territory and waters . . . subject to the jurisdiction of the United States." The latter phrase, if it stood alone, might lead to the conclusion that any territory over which the United States exercises any form of jurisdiction constitutes the "United States" for purposes of the FSIA. Since the United States has some jurisdiction over its Embassy in Iran, it would then follow that Iran had no immunity for tortious acts committed on the Embassy grounds. We think, however, that the modifying words make this construction too awkward to be countenanced. If the definition meant all territory subject to any form of United States jurisdiction, the words "continental or insular" would be surplusage: all territory is continental or insular. The modifying phrase is rather clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions. The ground upon which our Embassy stands in Tehran does not fall within that definition. Hence, Congress intended that, under the statute, Iran should retain its sovereign immunity in this case.

Though the legislative history of the FSIA does not address directly the meaning of "territory . . . subject to the jurisdiction of the United States," *see, e.g.,* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976) ("House Report"); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976), the focus of Congress' concern strongly suggests that the conclusion we have drawn from the statute's language is correct. Congress' principal concern was with torts committed in this country. The House Report makes clear that "Section 1605(a)(5) is *directed primarily at the problem of traffic accidents* but is cast in general terms as applying to all tort actions for money damages . . . ." House Report at 20-21 (emphasis added). Similarly,

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pending before this Court, the interests of the appellants and FLAG are identical." Brief for Appellants on Rehearing at vii, 1. Accordingly, we cite to FLAG's briefs as if they were appellants' own.

many of those testifying about the purpose and effect of the FSIA stressed the territorial limitation of the Act. *See, e.g., Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 27 (1976) (testimony of State Department Legal Advisor Monroe Leigh that proposed section 1605(a)(5) "would govern automobile accident cases and other tort actions. It would deny the defense of sovereign immunity with respect to may torts that *occur in the United States*" ((emphasis added)); *Id.* at 58 (testimony of Peter D. Trooboff) (FSIA eliminates immunity, for example, for "the negligent operation of a motor vehicle . . . in the District of Columbia"); *Id.* at 95 (testimony of Michael M. Cohen) (section 1605(a)(5) "removes the defense [of immunity] for most tort suits arising here").

Moreover, at the 1973 hearings to the predecessor bill—which, although not passed, was "essentially the same . . . except for [some] technical improvements,"[8] House Report at 10—one of the Act's principal draftsmen, Bruno Ristau, testified that:

> We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities *on our territory* to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities *on their soil.*
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> . . . .
>
> [W]e would like to afford *our local citizens* and entities who deal with foreign governments *in the United States* effective redress through the instrumentality of our courts. If a dispute arises as a result of an activity which a government carries on *in this country,* the most appropriate

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[8] Although the predecessor to the Act did not contain a definition of the "United States," there is no indication in the legislative history of the 1976 Act that the addition of section 1603(c) defining the jurisdiction of the United States was intended to expand the scope of the statute's exceptions.

> place to resolve such a dispute would be through the courts . . . .

Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau) (emphasis added).

In enacting the FSIA, Congress intended to "bring U.S. practice into conformity with that of most other nations." House Report at 12. Our reading of the "United States," as modified by the terms "continental or insular," is, therefore, reinforced by the fact that codifications by other nation-states and international organizations—with which Congress sought to be consistent—have provided that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state. Brief for the United States on Rehearing at 15-16, and statutes cited therein.[9]

Another reason for finding that sovereign immunity exists here is the series of unhappy consequences that would follow if we read section 1603(c) broadly to cover areas in which the United States had jurisdiction of any sort. These consequences would entail not only serious inconvenience and injustice but also embarrassment to our foreign relations. We offer these considerations not as policies we choose but as throwing light on congressional intent. If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.

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[9]Appellants contend that the Vienna Convention on Diplomatic Relations, by endorsing the rule of inviolability, and by substantially removing a foreign embassy from the jurisdiction of the receiving state, establishes that the United States exercises concurrent jurisdiction over embassy premises. Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 21-23. Inviolability, by itself, however, does not equal extraterritoriality. Moreover, the thrust of our holding here is that Congress, in enacting the FSIA, did not intend to exercise whatever power it may have over a foreign sovereign's tortious acts committed at U.S. embassy premises abroad.

One such consequence is that a decision abrogating sovereign immunity for torts on embassy premises would, as the government points out, be the "functional equivalent" of making U.S. embassies part of U.S. territory "for jurisdictional purposes." Brief for the United States on Rehearing at 28. Such a result could, for example, cause the French government to be subject to suit in the United States if a French government vehicle were involved in an automobile accident on the U.S. embassy grounds in West Germany. *Id.* at 29. Furthermore, foreign states "might hesitate in providing services to U.S. embassies or consulates" were they to be subject to suit in U.S. courts for negligent acts or omissions on those premises. *Id.* [10] In addition, since some foreign states base their sovereign immunity decisions on reciprocity, or parity of reasoning, it is possible that a decision to exercise jurisdiction in this case would subject the United States to suits abroad for torts committed on the premises of embassies located here. 6 M. Whiteman, *Digest of International Law* 580-82 (1968).

A principle revoking sovereign immunity on our embassy grounds abroad would also, presumably, have the same effect as to our military and naval bases around the world, since the United States exercises jurisdiction in such locations. The possibilities are almost endless for tort suits in this country

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[10]Appellants argue that the "discretionary function" exception to tort liability would shield foreign governments from liability in the examples posited by the government. Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 42-44. This is not so. One of the express purposes of the Federal Tort Claims Act, 28 U.S.C. § § 1346, 2671 *et seq.* (1976)--the act where the discretionary function was first set forth—is to permit suits for torts arising out of automobile accidents with U.S. government vehicles. Dalehite v. United States, 346 U.S. 15, 28 (1953). Moreover, the "discretionary function" exception has not shielded the United States from liability for torts committed while providing fire and police services—the very "services" the government argues that foreign states might hesitate to provide were we to limit their immunity for torts on embassy premises. *See, e.g.*, Rayonier Inc. v. United States, 352 U.S. 315, 317-19 (1957) (United States could be held accountable for the negligence of its firefighters); Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975) (United States could be liable for FBI agent's negligence in attempt to stop a hijacking).

against foreign governments for acts or omissions all over the world. We are persuaded that Congress intended nothing of the sort. Embassies may be, as appellants argue, unique in their inviolability but that does not distinguish them from military facilities, libraries, AID missions, and the like with respect to the criteria of the statute. If the controlling question were only whether the United States had some jurisdiction, all premises controlled by this country anywhere in the world would fit the statutory definition of the "United States." Fidelity to the statutory language would prevent us from picking and choosing among premises subject to some extent of congressional control.

Appellants rely heavily on two criminal cases, *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied.* 392 U.S. 936 (1968), and *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied,* 414 U.S. 876 (1973), to support their contention that the United States "may assert jurisdiction over activities occurring on the premises of United States embassies abroad." Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 14. In *Pizzarusso*, the Second Circuit held that Congress had the power to give federal courts jurisdiction over a visa applicant who, in an attempt to gain entry into the United States, perjured herself at the American Consulate in Canda. And in *Erdos*, the Fourth Circuit held that Congress had exercised its power to proscribe the killing of an American citizen by another American citizen within a foreign diplomatic compound. These cases are inapposite. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588-89 & n.9 (9th Cir. 1983). Neither involved the exercise of jurisdiction over a foreign sovereign. The question here, as in *Erdos*, is not the raw power of Congress to provide jurisdiction; rather, the problem is one of intention, *i.e.,* statutory construction. *Erdos,* 474 F.2d at 159. We do not think that Congress intended to abrogate the immunity generally enjoyed by a foreign sovereign for tortious acts at embassies within its own territory.[11]

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[11]In addition, jurisdiction in each of these cases was based on a statute defining jurisdiction for the purpose of the title dealing with federal crimes only—18 U.S.C. § 7 (1982), which covers the "special maritime and territorial jurisdiction of the United States"—as well as on different theories of jurisdiction. The *Pizzarusso* court

B.

The claims brought by Sergeant Persinger's parents present a variation on the issue just discussed. They seek to recover for mental and emotional distress suffered within the continental United States. Such injuries are said to be actionable because section 1605(a)(5) requires only that the injury be suffered in the United States but does not require that the tortious act or omission occur here.

Section 1605(a)(5) is ambiguous on this point. It states that immunity is removed in actions "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission" of a foreign state. It is thus unclear whether both the tort and the injury must occur here or whether the tort may occur abroad and be actionable so long as the injury is suffered here. *Compare Frolova v. Union of Soviet Socialist Republics,* 558 F. Supp. 358, 362 (N.D. Ill. 1983) (act or omission must occur in the United States), and *In re Sedco, Inc.,* 543 F. Supp. 561, 567 (S.D. Tex. 1982), *with Letelier v. Republic of Chile,* 488 F. Supp. 665, 674 (D.D.C. 1980) (only tortious injury need occur in the United States). *See generally, McKeel v. Islamic Republic of Iran*, 722 F.2d at 589-90 n.10. The ambiguity goes no deeper than the surface of the text, however, for the briefest consideration of the

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expressly invoked the "protective" theory of jurisdiction, that "a state 'has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.' " *Restatement (Second) of Foreign Relations Law of the United States* § 33 (1965), *quoted in Pizzarusso*, 388 F.2d at 10. Although the Fourth Circuit in *Erdos* did not explicitly label the head of jurisdiction that Congress had exercised to proscribe the conduct in that case, the result can be read as based on the "nationality" principle—the exercise of jurisdiction over U.S. nationals. But *Erdos* is inapposite primarily for the reason set forth above—that Congress did not intend the FSIA to apply to the case before us, whereas Congress did intend the "special maritime and territorial jurisdiction of the United States" to cover the case before the *Erdos* court.

purposes of the statute shows that the first alternative must be chosen: both the tort and the injury must occur in the United States.

We have shown that the proper construction of the statute deprives the district court of jurisdiction to entertain Sergeant Persinger's claim. Iran is immune from tort suits here for actions taken by it on its own territory. It would be anomalous to say that Congress intended to deny a remedy to him—a hostage imprisoned and physically abused for more than a year—and yet also intended to expose Iran to a suit by his parents for their emotional distress. Indeed, appellants' argument would have the result that had one hostage died in Tehran and another been released and died in the United States, both deaths being due to injuries inflicted while they were held hostage, the district court would have jurisdiction over the second suit but not over the first. Such results would deprive the statute of any policy coherence.

Our reading of the statute is further supported by the following passage in the House Report:

> It [section 1605(a)(5)] denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; *the tortious act or omission must occur within the jurisdiction of the United States* . . . .

House Report at 21 (emphasis added).

Moreover, a comparison of the noncommercial tort exception —section 1605(a)(5), under which this suit was brought—with the commercial activity exception, section 1605(a)(2), demonstrates that Congress intended the former to be narrower than the latter. The commercial activity exception expressly provides that a foreign sovereign's commercial activities "outside the territory of the United States" having a "direct effect" inside the United States may vitiate the sovereign's immunity. Any mention of "direct effect[s]" is noticeably lacking from the noncommercial tort exception. When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not

mean the same thing. *See Russello v. United States*, 104 S. Ct. 296, 300 (1983); *United States v. Martino*, 681 F.2d 952, 954 (5th Cir. 1982) (en banc), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Section 1605(a) (5) does not contain the "direct effect[s]" language of section 1605(a) (2), and therefore does not support jurisdiction over the parents' tort claims.[12]

For the reasons stated, we have concluded that the FSIA shields Iran from liability and this court has no jurisdiction over the claims of appellants Jacqueline and Lawrence Persinger, and their son, Sergeant Gregory Persinger. Our prior opinion is therefore vacated, and the judgment of the district court is

Affirmed.

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[12]Appellants also claim that the attack on the embassy was an "international crime" over which "every nation has jurisdiction to prescribe and enforce." Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 56. In addition, the United States could invoke the "protective principle" to exercise jurisdiction over Iran in this case. *Id*. at 57. There can be no doubt that Iran's actions were international crimes. *See* Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in* 19 I.L.M. 553 (1980). The heinousness of Iran's actions, however, is not sufficient to give this court jurisdiction to hear the plaintiffs' claims. Neither the substantive basis of the tort, nor the seriousness of the crime, is relevant to the question of jurisdiction. The FSIA, as the expression of Congress, applies to deprive us of jurisdiction.

EDWARDS, *Circuit Judge*, dissenting in part and concurring in part: I concur in the result in Part II.A, but I dissent from the rationale and holding of Part II.B.

Part II.B holds that 28 U.S.C. § 1605(a) (5) (1976) does not apply to Persinger's parents' claim for damages against Iran for mental and emotional distress suffered within the United States and caused by the seizure and detention of their son in Iran. Section 1605(a) (5) provides, in pertinent part, that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . .

I find the language of this provision unambiguous and clearly applicable on its fact to the parents' claim. In particular, the statute plainly requires that *only the injury,* and not the tortious act or omission, occur in the United States. I see no reason to resort to the legislative history to clarify the plain language of the statute. Congress never enacted the language of the House Report that "the tortious act or omission must occur within the jurisdiction of the United States." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 21 (1976).

Moreover, I do not find that the case law persuasively supports the reading of the statute adopted in the majority opinion. Only one case, *In re Sedco, Inc.,* 543 F. Supp. 561, 567 (S.D. Tex. 1982), holds that the tortious act or omission must occur in the United States. The *Sedco* court reached its conclusion primarily on the basis of the language of the House Report. A second case cited in the majority opinion, *Frolova v. Union of Soviet Socialist Republics,* 558 F. Supp. 358, 362 (N.D. Ill. 1983), merely states, without any analysis, that the tortious act or omission must occur in the United States. That statement is *pure dictum* because the court expressly declined to decide the Foreign Sovereign Immunities Act issue.

I am also not convinced that it is anomalous to allow Persinger's parents to recover damages for mental and emotional injuries suffered by virtue of their son's confinement, but not to allow Persinger himself to recover damages for his own confinement. As a policy matter, Congress might easily have determined to give American courts jurisdiction over claims for damages caused by tortious acts or omissions occurring outside the United States only to the extent that those acts or omissions produce effects within the United States.

Finally, I am not convinced that the "direct effect" language of section 1605(a) (2) compels the reading of section 1605(a) (5) adopted in the majority opinion. There is nothing in the legislative history to support this view and one might as easily assume that Congress intended to restrict jurisdiction more in cases involving commercial activity not carried on in the United States than in cases involving noncommercial torts.

My main point of dissent is that the clear terms of the statute allow for the parent's claim. I do not think that we are at liberty to decide otherwise on "policy grounds."

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2003

GREGORY ALLEN PERSINGER, ET AL., APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-00230)

Argued April 26, 1982
Decided October 8, 1982

Judgment entered
this date

Julian N. Eule of the bar of the Supreme Court of Pennsylvania pro hac vice by special leave of Court with whom *Mark H. Tuohey, III* was on the brief, for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael F. Hertz, Attorney, Department of Justice with whom *Charles F.C. Ruff*, United States Attorney at the time the brief was filed, *Robert E. Kopp* and *Theodore C. Hirt*, Attorneys, Department of Justice were on the brief, for United States.

Thomas G. Shack, Jr., Christine Cook Nettesheim and *Thomas D. Silverstein* were on the brief, for appellee, The Islamic Republic of Iran.

Brice M. Clagett and *Paul G. Gaston* were on the brief, for amicus curiae, Flag, Inc., urging the Court to limit any affirmance of the dismissal order.

Before: EDWARDS and BORK,, *Circuit Judges*; BAZELON, *Senior Circuit Judge*

Opinion for the court filed by *Circuit Judge BORK*.

BORK, *Circuit Judge*: This is an action for damages against the Islamic Republic of Iran for injuries inflicted by the seizure and detention of American hostages. Appellants, plaintiffs below, are a former hostage and his parents. The question before this court is whether an executive order signed by President Carter, pursuant to an agreement with Iran to secure the release of the hostages, lawfully and effectively extinguished appellants' claims against Iran. We conclude that the executive order does so and therefore affirm the district court's ruling that appellants have failed to state a claim upon which relief can be granted.

BACKGROUND

Gregory Allen Persinger is a United States Marine who on November 4, 1970, was stationed at the United States Embassy in Tehran, Iran. On that date, the Embassy was seized by Iranian militants, and the Embassy's personnel, including Sergeant Persinger, were captured and held hostage. This act, which was not merely hostile to the United States but unprecedented in the history of international relations, at once created a crisis between the United States and Iran. The United States tried to secure the release of the hostages through a series of stringent retaliatory measures, but all such efforts failed.[1]

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[1]The President declared a national emergency and issued an executive order blocking Iran's threatened removal or transfer of all

Ultimately, the United States was able to obtain the hostages' freedom only by an executive agreement with Iran that necessarily made concessions to that country. Since diplomatic relations with Iran had been severed, the agreement was embodied in two Declarations of the Government of Algeria, initialed for the United States by Deputy Secretary of State Warren M. Christopher on January 19, 1981. The hostages, including Sergeant Persinger, were released the following day. They had been captives for almost fifteen months.

In the first Declaration, the parties stated that it was their purpose to

> terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. . . . [T]he United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran . . ., to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[2]

In the second Declaration, the parties established an international arbitral tribunal—the Iran-United States Claims Tribunal—to settle, *inter alia*, claims of United States nationals

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Iranian assets in this country. The United States and other nations imposed trade sanctions upon Iran. The United States took its case to the International Court of Justice at the Hague, which declared Iran's actions to be in violation of international law. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in 19 International Legal Materials* 553 (1980). Finally, the United States attempted a military rescue operation that cost several American Lives.

[2]Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle B, *reprinted in 20 International Legal Materials* 224 (1981). *See also id.* ¶ 11, at 227 (United States agreed to "bar and preclude the prosecution against Iran of any pending or future claim of . . . a United States national arising out of events occurring before the date of the declaration").

against Iran.[3] The Declaration specifically excepted from the tribunal's jurisdiction, however, claims against Iran relating to the seizure of the Embassy and the detention of the hostages.[4] Thus, the executive agreement was clearly intended to extinguish in all possible forums the claims, both existing and potential, of United States hostages and their families.

In a series of executive orders signed on January 19, including Executive Order No. 12283, President Carter directed the Secretary of the Treasury to promulgate regulations implementing the executive agreement with Iran. By its terms, Executive Order No. 12283 required regulations "prohibiting any person subject to U.S. jurisdiction from prosecuting in any court . . . any claim against the Government of Iran arising out of events" relating to, *inter alia*, the seizure of the hostages and their subsequent detention, § 1-101(a); "prohibiting any person not a U.S. national from prosecuting any such claim," § 1-101(b); "ordering the termination of any previously instituted judicial proceedings based upon such claims," § 1-101(c); and "prohibiting the enforcement of any judicial order issued in the course of such proceedings," § 1-101(d).[5] On February 24,

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[3]Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, ¶ 1, *reprinted in 20 International Legal Materials* 230-31 (1981).

[4]*Id.*

[5]Executive Order No. 12283, 46 Fed. Reg. 7927 (1981), reads in full as follows:

> Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere
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> By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive

Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1-101. The Secretary of the Treasury shall promulgate regulations: [a] prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran; [b] prohibiting any person not a U.S. national from prosecuting any such claim in any court within the United States; [c] ordering the termination of any previously instituted judicial proceedings based upon such claims; and [d] prohibiting the enforcement of any judicial order issued in the course of such proceedings.

1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

1-103. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purpose of this Order.

1-104. This Order shall be effective immediately.

/s/ Jimmy Carter

THE WHITE HOUSE
January 19, 1981

1981, President Reagan ratified Executive Order No. 12283 and the other orders signed on January 19. Executive Order No. 12294, 46 Fed. Reg. 14,111-12 (1981). The Secretary of the Treasury issued the implementing regulations on February 26, 1981. 46 Fed. Reg. 14,334 (1981) (to be codified at 31 C.F.R. § 535.216). Though the regulations were required to implement Executive Order No. 12283, we will, for simplicity, speak of the Order as accomplishing results directly.

THIS LITIGATION

Sergeant Persinger and his parents brough suit in the district court against the Islamic Republic of Iran on February 2, 1981, alleging numerous violations of treaties and of international, constitutional, and common law. Counsel for Iran entered an appearance but did not defend. Instead, the United States, to meet its obligations under the executive agreement with Iran, *see American International Group, Inc. v. Islamic Republic of Iran,* 657 F.2d 430,433 (D.C. Cir. 1981), intervened as party-defendant and moved to dismiss the complaint. After a hearing, District Judge Oberdorfer granted the government's motion.[6] J.A. at 102. The district court did not decide whether the simple release of the hostages was a "full satisfaction" of their claims. Relying on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), it held instead that "the President may dispose of private claims against foreign states to resolve, or avoid, international crises."

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[6]Other judges in this circuit had previously dismissed the claims of hostages and their families. Williams v. Iran, Civ. Action No. 79-3295 (D.D.C.), and Lauterbach v. Iran, Civ. Action No. 81-0350 (D.D.C.) (opinion in consolidated cases, June 11, 1981), *appeals pending,* Nos. 81-1672, 81-1676 (D.C. Cir.); Moeller v. Islamic Republic of Iran, Civ. Action No. 80-1171 (D.D.C. Aug. 5, 1981) (no appeal taken). Two other district courts have subsequently dismissed actions brought by former hostages and their families. McKeel v. Islamic Republic of Iran, Civ. Action No. 81-0931, and consolidated case Nos. 81-5108, 81-5109, 81-5274, 81-5482 (C.D. Cal. Nov. 20, 1981) (dismissing for lack of jurisdiction), *appeals pending,* Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117 (9th Cir. Jan. 8, 1982); Roeder v. Islamic Republic of Iran, Civ. Action No. 81-5410 (C.D.Cal. Mar. 8, 1982) (dismissed), *appeal pending*, No. 82-5417 (9th Cir. Apr. 22, 1982).

J.A. at 104. (In *Dames & Moore*, the Supreme Court upheld the legality of a different executive order issued as part of the effort to carry out the Algerian Declarations.) The district court held, in the alternative, that even in the absence of a valid executive order, Iran enjoys immunity under the Foreign Sovereign Immunities Act (FSIA or Act), 28 U.S.C. §§ 1330, 1603(c), 1605(a)(5) (1976), from suit for torts committed within the confines of the United States Embassy in Tehran. This appeal followed.

ANALYSIS AND DECISION

Subject Matter Jurisdiction

Neither the appellants nor the United States contend that this court lacks subject matter jurisdiction.[7] If, however, as appellants argue, Executive Order No. 12283 attempts to curb the jurisdiction of the federal courts, and if, contrary to appellants' view, that attempt is lawful, subject matter jurisdiction is indeed lacking. The United States concedes neither that the Executive Order modifies the courts' jurisdiction nor that it is unconstitutional if it does. Instead, the United States proposes that this court not address the jurisdictional issue because, if the President lawfully "settled" the claims of appellants, the litigation must end and, therefore, whether the President withdrew jurisdiction makes no difference in practical terms.

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[7]The United States argued in its motion to dismiss before the district court that the court lacked subject matter jurisdiction because Congress did not provide for jurisdiction over Iran in the FSIA. On appeal, the government argues that Iran's immunity under the FSIA warrants dismissal for failure to state a claim on which releif can be granted. Contrary to the government's current position, however, and contrary to one possible reading of a statement in *Dames & Moore*, 453 U.S. at 685 ("No one would suggest that a determination of sovereign immunity divests the Federal courts of 'jurisdiction.' "), the issue of sovereign immunity is jurisdictional in that, even though a court's jurisdiction and a party's immunity are conceptually distinct, the FSIA expressly deprives the federal courts of jurisdiction over any party that is entitled to sovereign immunity. *See* 28 U.S.C. § 1604 (1976); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981); *cf.* Tuck v. Pan American Health Organization, 668 F.2d 547, 549 (D.C. Cir. 1981) (immunity issue must be addressed before merits). We discuss the issue below.

This may be a practical solution, but we think it an impermissible, and surely an undesirable, one. If a court lacks jurisdiction, it has no power to reach the merits.[8] "Subject matter jurisdiction . . . is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Insurance Corp of Ireland, Ltd. v. Campagnie des Bauxites de Guinea,* 102 S. Ct. 2099, 2104 (1982). That characterization includes limits to the powers of federal courts. To exceed those limits is to exercise power illegitimately. For that reason, federal courts ought not to pronounce views on matters without being sure that the issues are rightfully theirs to decide, and this proscription is of special importance when the issues are as serious as those in this case. A court that avoids the jurisdictional question risks unknowingly invading the provinces of other branches of the federal government or those of the states. This difficulty, which implicates fundamental principles of separation of powers and federalism, is not avoided because the pronouncement happens to be correct. A question of the legitimacy of the court's authority remains. There is, as well, another danger inherent in such a practice. There may be a temptation, when the merits clearly favor the party who asserts the absence of jurisdiction and the jurisdictional issue appears complex, to decide the merits in his favor and avoid the question of jurisdiction. The outcome is the same. But when the substantive issues are arguable either way, a court should fear that a desire to avoid the knotty jurisdictional problem may, quite subconsciously, affect its view of the merits. That danger can be averted with certainty only if the issue of jurisdiction is reached and decided first.

To support the proposition that President Carter attempted to curb federal court jurisdiction, appellants cite those portions of the Order which required the Secretary of the Treasury to promulgate regulations "ordering the termination of any previously instituted judicial proceedings" and "prohibiting the

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[8]That fundamental precept is embodied in Fed. R. Civ. P. 12(h): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

enforcement of any judicial order issued in the course of such proceedings." Executive Order No. 12283, § 1-101(c), (d). The regulation issued used similar language. 31 C.F.R. § 535.216(c) states: "No further action, measure or process shall be taken . . . in any judicial proceeding . . . and all such proceedings shall be terminated." Thus, appellants argue that "the President's order addresses the court and not merely the claim.;" Brief for Appellants at 14.[9]

Neither party has brough the fact to our attention, but the particular provisions appellants read as an atatempt to remove jurisdiction do not apply to their case. Those portions of Executive Order No. 12283, issued January 19, 1981, which order the termination of proceedings and prohibit the enforcement of judicial orders (subsections (c) and (d) of § 1-101) apply only to "previously instituted judicial proceedings."

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[9]Appellants stress the difference in the terminology employed in Executive Order No. 12294, dealing with commercial claims, which "suspended" all claims that could be presented to an Iran-United States Claims Tribunal for arbitration. Awards of that Tribunal are to be final, but any claim the Tribunal refuses to consider as not within its jurisdiction will revive for disposition in courts. Thus, this court in American International Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 441 (D.C. Cir. 1981), construing Executive Order No. 12294, stated:

> We note that the President did not order the litigation suspended, or the power of the courts to consider the claims suspended. Instead, he acted with respect to the claims only. We read this as an effort to modify not the jurisdiction of the courts, but the substantive rule of law they are to apply.

In *Dames & Moore*, the Supreme Court similarly disposed of this jurisdictional argument:

> Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law.

453 U.S. at 684-85.

Similarly, the Treasury regulation implementing the Executive Order, 31 C.F.R. § 535.216(c) and (d), though published February 24, 1981, affects only "judicial proceeding[s] instituted before the effective date of this section," which is January 19, 1981. This suit was filed on February 2, 1981. Thus, the language alleged to raise a jurisdictional issue does not reach this case.

We feel it necessary, nonetheless, to pursue the question of subject matter jurisdiction to make certain that it exists. Although appellants rely for their Article III-based challenge solely on the specific language of subsections (c) and (d) of the relevant sections of the Executive Order and Treasury regulation, they need not have done so. Nothing in what law there is concerning the distinction between an attack on jurisdiction and a change in substantive law makes entirely frivolous an argument that the language of subsections (a) and (b), barring the "prosecuting" of certain claims, constitutes an attempt to restrict subject matter jurisdiction. Indeed, in *Dames & Moore*, even though the challenged Executive Order contained no language addressed to courts rather than to actual or potential litigants, the Supreme Court addressed, and rejected, the argument that the Executive Order attempted to divest federal courts of jurisdiction. 453 U.S. at 684-85. Moreover, it might be argued that, (c) and (d) being invalid attempts to control jurisdiction, (a) and (b) are tainted and fail as well.

If, indeed, the President had attempted to deprive the courts of jurisdiction, a very serious problem would be presented for decision. The Executive Order, so construed, would be addressed to all courts—federal, state, and local. The President would thus be claiming the power, at least in international emergencies, to alter a subject matter jurisdiction for federal courts given by the Constitution and Congress and a jurisdiction for state and local courts given by state legislatures and local assemblies. That would be an awesome power; its very sweep and, to put the matter no higher, its dubious constitutionality are among the factors that lead us to believe the President has not asserted it.

The portions of the Executive Order and Treasury regulation applicable to appellants are addressed to persons, not to courts—one index of a legal change rather than a jurisdiction divestiture. The language mistakenly relied on by appellants is

best read as addressed to claimants already in litigation and as describing the effect upon them of the prohibitions on further prosecution. To order the termination of litigation and to prohibit the enforcement of judicial orders may be understood quite naturally, in the context of a single section primarily addressed to persons, as directions to claimants rather than to courts. This is a more natural reading since nothing in the Executive Order or Treasury regulation mentions "jurisdiction." *See Dames & Moore*, 453 U.S. at 684-85. Read in the light of the constitutional difficulties inherent in a jurisdiction restriction, all of the provisions of the Executive Order and Treasury regulation are best understood as defining a rule of law to be applied by courts when faced with certain types of claims. *See American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d at 441.

We do not believe this reading strains the text, and we are reinforced in our belief that this is the interpretation the court must give the language in question by three additional considerations. The first we have already mentioned. It appears highly improbable that the President would have asserted a constitutional power so sweeping and so questionable in a fashion so casual that neither he nor his aides thought it worth defending his possession of that power. Second, the Declarations were drafted not merely in haste but under emergency conditions. The Executive Orders largely tracked the language of the Declarations, probably in order to avoid any charge that the agreement embodied in the Declarations had not been carried out in full. It would be particularly inappropriate to seize upon ambiguities in language drafted under such conditions to provoke a major constitutional dispute. Finally, even if appellants' construction of the text were more probably the correct one, courts have more than once allowed the pressure of a constitutional issue to influence their interpretation of language. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). We hold, therefore, that Executive Order No. 12283 and its implementing regulation contain no attempt to curb the subject matter jurisdiction of any court.

To determine whether the district court had jurisdiction in this case, we must also address the issue of sovereign immunity. *See* note 7 *supra*. Appellants contend that the alleged actions of Iran challenged here come within the exception to sovereign immunity stated in 28 U.S.C. § 1605(a) (5) (1976). Section 1605(a) (5) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . .

Iran's actions as alleged in the complaint clearly fall within the language of this provision unless they did not occur "in the United States" or unless they were "discretionary."[10] We conclude that, for purposes of the FSIA, the embassy seizure did occur in the United States and was not discretionary; therefore, there is no sovereign immunity bar to jurisdiction.

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[10]The United States notes, in arguing for a limited interpretation of section 1605(a) (5), that the provision "is directed primarily at the problem of traffic accidents." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976). But the language of the section does not admit of a limitation to traffic accidents; indeed, the House Report relied on by the United States expressly points out that the section "is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a) (2) relating to commercial activities." *Id.* at 20-21.

Section 1603(c) defines "the United States" to "include all territory and waters, continental or insular, subject to the jurisdiction of the United States." Because nothing we have been pointed to in the legislative history of the FSIA offers any aid in defining "territory . . . subject to the jurisdiction of the United States," *see, e.g.,* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976), the language itself is our sole guide to decision. That language does not require the territory to be territory of the United States in any absolute sense. In particular, that the embassy in Iran was not United States territory under international law, *see Restatement (Second) of the Foreign Relations Law of the United States* § 77 comment a (1965) (embassies are not territory of sending state); J. Brierly, *The Law of Nations* 260-61 (6th ed. 1963) (same), does not establish the embassy's exclusion from the coverage of § 1603(c). Moreover, the definition of "United States" does not in terms require that the covered territory be exclusively subject to United States jurisdiction. The definition is broad enough to embrace territory under the concurrent jurisdiction of the United States. American embassies abroad meet that criterion, for they are subject to the broad authority of Congress to enact legislation "for the effective regulation of foreign affairs." *Perez v. Brownell,* 356 U.S. 44, 57 (1958), and of the State Department to establish rules governing consular affairs, *see, e.g.*, 22 U.S.C. § § 2658, 3926-3927 (1976 & Supp. IV 1980). For example, both United States citizens and foreign nationals are subject to the criminal jurisdiction of the United States for acts committed at American embassies abroad in violation of United States criminal laws. *United States v. Erdos,* 474 F.2d 157 (4th Cir. 1973); *United States v. Pizzarusso,* 388 F.2d 8 (2d Cir. 1968). In addition, although the specific language of the Federal Tort Claims Act, 28 U.S.C. § 2680(k) (1976) (excluding "any claim arising in a foriegn country"), bars tort suits against the United States arising out of events at American embassies abroad, *Meredith v. United States*, 330 F.2d 9 (9th Cir. 1964), there is no disputing Congress's power to provide otherwise, and the State Department has statutory authority to "pay tort claims . . . when such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669(f) (1976).

Thus, United States jurisdiction exists in at least two important forms for the protection of persons in American embassies abroad. We have been directed to no example of an interest of such persons for which American jurisdiction provides no protection. Indeed, it is difficult to imagine types of jurisdiction the United States might wish to exercise over its embassies is reinforced by international law's substantial removal of embassies from the jurisdiction of the receiving state. *See, e.g.,* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. In terms of legal regulation and protection, therefore, the situation of American embassy personnel created by the jurisdiction of the United States is more like that of Americans at home than that of Americans outside an embassy living in a foreign country. For these reasons, we hold that the United States exercises concurrent jurisdiction over its embassies, so that section 1603(c) of the FSIA includes American embassies abroad.

Section 1605(a)(5) by its terms therefore covers the Iranian actions alleged in appellants' complaint unless those actions were discretionary within the meaning of subsection 1605(a)(5)(A). That subsection, according to the House Report, provides exceptions to jurisdiction that "correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. § 2680(a)." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976). Under that law an act is not discretionary if it is patently illegal or if it is clearly outside the authority of the government or official, so that it is not within the range of discretionary authority within which "there is room for policy judgment and decision," *Dalehite v. United States,* 346 U.S. 15, 36 (1953). *See, e.g., Barton v. United States,* 609 F.2d 977, 979 (10th Cir. 1979); *Birnbaum v. United States,* 588 F.2d 319, 329-30 (2d Cir. 1978); *Griffin v. United States,* 500 F.2d 1059, 1068-69 (3d Cir. 1974). An act that is not discretionary in that sense falls outside the range of actions within which decisions should be made without fear of liability, and hence it is not protected by the policy behind the discretionary-

function exception to FTCA liability. *See Ferri v. Ackerman*, 444 U.S. 193, 203 n.20 (1979). Because the same policy lies behind subsection 1605(a) (5) (A) of the FSIA, and the legislative history directs us to refer to the analogous FTCA provision, we adopt for the FSIA the FTCA's standard for defining "discretionary function." Appellants allege that the seizure and retention of the American embassy in Tehran were, for tort-law purposes, the actions of the government of Iran, and since the complaint was dismissed without the introduction of evidence, we must suppose that allegation to be true. Applying the FTCA's standard to this assumed fact, it is clear that the alleged Iranian action was nondiscretionary because patently illegal. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (Iran and U.S. parties) (*e.g.*, art. 22: "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. 2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion . . . ."); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (Iran and U.S. parties) (*e.g.*, arts. 31, 41); Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 901, T.I.A.S. No. 3853 (art. XIII); *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 200, *reprinted in* 19 *International Legal Materials* 553 (1980) (Iran's actions during seizure and detention of hostages at embassy violate treaties as well as long-established rules of general international law).

We conclude, in sum, that Iran cannot claim immunity in this case and, therefore, that jurisdiction exists to hear this case under the FSIA. The district court properly entertained this case on the merits and so must we. We turn next to the question whether the President has the power to alter the substantive law governing this litigation.

The President's Power to Extinguish Claims

Our analysis of the President's power to extinguish the hostages' legal claims against Iran must be guided by, though it cannot end with, the Supreme Court's opinion in *Dames &*

Moore. While there are strong similarities between this case and *Dames & Moore*, there are also important differences. In that case, moreover, the Supreme Court was careful to warn: "We attempt to lay down no general 'guide-lines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." 453 U.S. at 661. Nonetheless, an attempt to say nothing of general guidance must always be defeated in some measure as soon as reasons are given for the particular decision.

Dames & Moore upheld Executive Order No. 12294, which suspends all commercial claims of United States nationals against Iran while they are presented to international arbitration for final determination. Should the tribunal decide it lacks jurisdiction over any claim, that claim will revive and the claimant will once more be able to assert it in American courts. *See Dames & Moore,* 453 U.S. at 684-85. Unlike Executive Order No. 12283, involved here, 12294 did not terminate the claims.

It is the premise of appellants' argument in this case that the President went to the outer limits of his power in the order upheld in *Dames & Moore* and so must be held to have exceeded his constitutional power here. There is, however, no suggestion in *Dames & Moore* that the President might not have the power asserted in this case. The only guidance the Court provided is a mode of analysis that we must employ.

The issue is the President's power to direct the courts to apply one rule of law rather than another to a particular class of claims. There can be little doubt that the President's action would be lawful if taken pursuant to congressional authorization. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). But here there is no authorizing or ratifying legislation by Congress. At the other extreme, it is as certain as anything can be that the President could not make substantive law in direct opposition to legislation by Congress. This is the lesson of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In rejecting President Truman's claim of constitutional power to seize the nation's steel mills to avert a strike and keep the mills running during the Korean conflict, Justice Black's opinion for the Court placed emphasis on the fact that Congress had expressly refused to give the President the power

exercised and had provided other mechanisms for dealing with such labor disputes. 343 U.S. at 586.[11]

This case differs from *Youngstown* because there is here no congressional disapproval, express or tacit, of what was done. Neither, as we have noted, is there prior explicit congressional authorization or explicit subsequent ratification. *Youngstown* does not require, however, that there always be formal congressional assent. Tacit approval may often suffice. This case, like *Dames & Moore*, thus concerns that little-explored mid-range of presidential power, that "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

In that zone, "the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.' " *Dames & Moore*, 453 U.S. at 668-69 (quoting in part from *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Here, as in *Dames & Moore*, congressional views are discernible primarily by reference to the principle formulated by Justice Frankfurter in *Youngstown*: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government,

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[11] These factors were stressed in the concurring opinions of Justices Frankfurter, *id.* at 597-609, Jackson, *id.* at 637-39, Burton, *id.* at 656-60, and Clark, *id.* at 662-66. Even Chief Justice Vinson's opinion for the three dissenters thought it important to stress that the President had not acted in defiance of a law of Congress. *Id.* at 701-03. Justice Frankfurter put the matter flatly: "It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation." *Id.* at 602. Indeed, President Truman also agreed that Congress could override his action. *Id.* at 677.

may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II." 343 U.S. at 610-11.[12] The difficulty of applying this principle to the almost unimaginable variety of situations that may arise makes it important to stress that today's decision does not purport to suggest how this principle may apply to circumstances other than those involved here. As Justice Jackson wrote in *Youngstown*, "[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." 343 U.S. at 637 (footnote omitted). The present case involves a unique emergency in the foreign affairs of the United States, one in which the President sought to end the captivity of American citizens as well as possible danger to their lives.

The crucial question in *Dames & Moore* was whether Congress had acquiesced in the presidential power asserted. For purposes of this case, we need only summarize the evidence that convinced the Supreme Court that Congress had acquiesced in the type of presidential action involved there. The Court held that no statute authorized the President's action but said: "[W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress." 453 U.S. at 678. Thus, the International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C. § § 1701-1706 (Supp. III 1979) ("IEEPA"), and the "Hostage Act," 22 U.S.C. § 1732 (1976),[13] while they did not authorize the

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[12]Congress has questioned particular exercises of the presidential power at issue here, *see* note 16 *infra*, but never, to our knowledge, the power itself.

[13]Section 203 of the IEEPA, 50 U.S.C. § 1702 (Supp. III 1979), provides in part that

> the President may . . . nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . by any person, or with respect to any property, subject to the jurisdiction of the United States.

President's suspension of the claims, were deemed "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case." 453 U.S. at 677.[14] Those circumstances—the international crisis—are, of course, identical in this case. The Court stated:

> [T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiesence in conduct of the sort engaged in by the President.

Id. at 678-79.

The Court reviewed the history of congressional acquiesence. It is summarized in two statements in the Court's opinion. The first is: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settle-

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In rejecting this provision as direct authority for the President's power to suspend claims, the Court concluded that "[t]he claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property." 453 U.S. at 675.

The Hostage Act directs the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of any United States citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The legislative history of this statute, according to the Supreme Court, belied the argument that it was designed to cover a situation like the Iranian hostage crisis. 453 U.S. at 676-77.

[14]Since Congress cannot anticipate every possible action a President may need to take in all possible situations, failure to have delegated a particular authority, especially in the field of foreign policy and national security, does not imply disapproval of action. 453 U.S. at 678 (citing Haig v. Agee, 453 U.S. 280, 291 (1981)).

ment by executive agreement." 453 U.S. at 680. However, the practice the Court was describing differs from the practice involved in this case: "[T]he President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures." 453 U.S. at 679. With respect to the hostages, no lump sum was paid for their claims and no tribunal was created or specified to try those claims. The President, pursuant to his agreement with Iran, totally extinguished the hostages' claims in return for the hostages' release. The government has been unable to point to any previous episode in which the President, without specific authorization or ratification by Congress, wholly extinguished the claims of American nationals. That is not surprising, perhaps, since no President had ever faced a situation quite like this.

The United States contends that there was a "settlement" here and that this case is therefore governed by *Dames & Moore*, that is, that this arrangement is of the type in which Congress has acquiesced over the years. Appellants just as earnestly deny that their claims were "settled" since they received nothing other than the cessation of illegal behavior.

There is little to be gained from an inquiry into the various meanings and nuances of the word "settlement." We have been warned on good authority that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). With respect to issues of this gravity, semantic arguments weigh little against considerations of constitutional structure and function and considerations of the necessity of the case.

What it is that Congress has approved over the years can be stated at different levels of generality. It is possible to say that Congress has acquiesced only in the long-standing presidential practice of disposing of the claims of Americans against foreign governments when a sum of money was obtained in return or an alternative tribunal provided. It is also possible to say that Congress has acquiesced in presidential authority to dispose of claims when important foreign policy considerations were at stake. The force of the first, more limited formulation is considerably diminished when it is recognized that Congress

has never been presented with a situation in which claims were wholly extinguished, largely because no President ever faced a situation quite like the Iranian hostage crisis.

We think the evidence of congressional approval of presidential actions recited in *Dames & Moore* applies to the agreement made by President Carter. Strong presidential authority in the field of claim disposal, when necessary to the imperative interests of the Nation, is, we believe, what Congress has approved. We note that the *Restatement (Second) of the Foreign Relations Law of the United States* § 213 comment a (1965) apparently comes to the same conclusion: "Under the rule of international law . . . it is clear that the government of the United States can, without consent of the injured party, effect a *waiver* or settlement that relieves the foreign state of further responsibility. It is equally clear that such consent is not required by the law of the United States." (Emphasis added.)[15]

Congress's reaction to the President's handling of this specific set of events does more than shed direct "light on the views of the Legislative Branch toward" the specific action challenged here. *Dames & Moore*, 453 U.S. at 668. Congress's acquiescence here also supports our understanding of the scope of the presidential authority that Congress has accepted over the years. Both the agreement with Iran and Executive Order No. 12283 are now over one and one-half years old, as is President Reagan's ratification of that Order. Congress has in no way manifested any disapproval of what was done to secure the release of the hostages. Congress has enacted no legislation reinstating hostage claims. It has enacted no legislation forbidding such action by a President in the future. In fact, so far as we have discovered, no bill of such tenor has even been introduced. To the contrary, the only bills relating to the subject that have been introduced would, if enacted, provide for compensation to the former hostages. Thus, Congress can realistically be said to have approved this specific action,[16] and this congressional

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[15]In *Dames & Moore*, the Court quoted with approval the heading of § 213: "(President 'may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national')." 453 U.S. at 680.

[16]The Supreme Court stated in *Dames & Moore*, 453 U.S. at 688 n.13:

approval is strong evidence of the level of generality to be attributed to congressional acquiescence through our history: the President need not obtain a sum of money or an alternative tribunal but may extinguish claims altogether when "the imperatives of events" make that necessary to resolve an international crisis.

This reading of congressional approval and presidential authority is supported by the necessities of government. The first rule of construing the Constitution is that the resulting allocation of powers must be adequate to the problems the country must face. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). No doubt congressional approval of the action taken here reflects an appreciation of that principle. If Congress reinstated the hostage claims or disapproved such presidential action for the future, a President of the United States might be rendered helpless to rescue United States citizens and resolve a dangerous international crisis should such an event as the hostage detention ever recur. A ruling by a federal court that the hostages' claims survived Executive Order 12283, if allowed to stand, would have the same crippling effect upon the President in the future.

General approval by Congress of this type of presidential action is often the most that can be expected before specific executive agreements are made. In circumstances like the Iranian hostage detention, it will often be utterly impracticable

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Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over $105 million in claims against Czechoslovakia for $20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. [*See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974*, 69 Am. J. Int'l L. 837, 839-40 (1975).]. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

for a President to negotiate with Congress and the foreign government simultaneously in order to get legislation authorizing the precise agreement that must be made. Legislative bodies are designed for deliberation, not for instantaneous responses to shifting negotiation positions. In addition, the progress of negotiations such as these must often be secret. Revelation of positions taken and compromises proposed would often destroy any prospect of ultimate success. We find nothing in the Constitution that mandates any such stultifying and possibly disastrous result.[17]

We think this result is confirmed by a parallel line of reasoning. If federal court approval of foreign policy actions of this type depended upon whether there had been a "settlement" in the form of a lump sum payment or the provision of an arbitral tribunal, then the courts would have to determine whether the payment or the tribunal was adequate. Otherwise, the settlement requirement would become practically meaningless to the persons whose claims were abated. Yet judicial review of the adequacy of a presidential settlement would mean that the foreign nation involved would not know whether it had a valid agreement with the United States until perhaps years of litigation had been concluded. Few agreements would be made under such a requirement, and, in particular, it seems clear that President Carter's agreement with Iran would not have been possible.

Perhaps for this reason counsel for appellants conceded at oral argument that even an inadequate settlement (the example

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[17]We reiterate, lest we be misunderstood, that we are speaking only of presidential action within a range where Congress may realistically be said to have given its approval. Nothing said here is intended to suggest a presidential power to negotiate secretly and to extinguish claims in opposition to the will of Congress. Convenience and efficiency are not the sole constitutional values in play even in foreign affairs, and we remain mindful of the admonition that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

used was $5,000 per hostage for fifteen months of imprisonment and physical abuse) would extinguish their claims against Iran and that any remaining amount of the claim would have to be asserted as a claim against the United States for the taking of private property. We agree that counsel's concession was a proper one, both because of the stated effect upon foreign policy and because of the proximity of the political question doctrine should courts undertake such a reviewing function.[18] But this conclusion means that the asserted settlement requirement is wholly artificial. If the President could secure the hostages' freedom and safety in return for extinguishing their claims for damages, and if the amount of any "settlement" is not judicially reviewable, what point can there be in insisting that he must receive as well $5,000 per hostage, or $5, or merely the traditional peppercorn? That would make constitutional authority turn on utter trivialities. To impose so entirely symbolic a requirement would not be merely pointless; it could be dangerous. There will be regimes—the President may reasonably have believed he was dealing with one here—that will not pay even a token sum because to do so would be to confess wrongdoing before the world. In those circumstances, to demand that the President get a few dollars in addition to the freedom and safety of the hostages would be to ensure that he

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[18]Baker v. Carr, 369 U.S. 186, 217 (1962), gives the standard formulation of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Most, if not all, of these characteristics of a political question would evidently be present in any judicial effort to review the adequacy of a claims settlement agreed to by the President in resolving an international crisis like the one giving rise to this case.

get neither and that the hostages remain indefinitely in captivity and peril.

We conclude that Executive Order No. 12283 and the regulations issued under it extinguished appellants' claims against Iran. The district court correctly dismissed their complaint because it failed to state a claim upon which relief can be granted.

Appellants' Taking Claim

The Persingers argue finally that the President acted unlawfully in extinguishing their claims because doing so effected a taking of private property for public use for which the Fifth Amendment mandates that just compensation be paid.[19] The suggestion, apparently, is that the remedy for a taking for which compensation has not been paid is to invalidate the executive order. We need not address that proposition in its full generality because, if there has been an unconstitutional taking, a point we do not decide, the Fifth Amendment affords no basis for invalidating the challenged action in this case.

Executive Order No. 12283 is immune from invalidation under the takings clause because, as in *Dames & Moore*, there was at the time of the alleged taking a "reasonable, certain and adequate provision for obtaining compensation." *Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 641, 659 (1890); *see Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Stringer v. United States*, 471 F.2d 381, 383 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973). Appellants argue that no provision for compensation to the hostages has been forthcoming from Congress or the President. But the availability of the Tucker Act, which gives the Court of Claims jurisdiction to award damages for takings-clause violations, 28 U.S.C. § 1491 (1976), satisfies the constitutional requirement of an adequate provision for compensation.[20] *See Regional Rail Reorganiza-*

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[19]The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

[20]We indicate no view on the legal consequences of a taking where there is no adequate provision for compensation. *See* Hurley v.

tion Act Cases, 419 U.S. at 122-36; *Hurley v. Kincaid*, 285 U.S. at 104-05; *Stringer v. United States*, 471 F.2d at 383. In *Dames & Moore*, the Supreme Court stated:

> [T]o the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

453 U.S. at 689-90.[21] That reasoning controls this case: appellants are free to pursue their taking claim against the United States in the Court of Claims under 28 U.S.C. § 1491 (1976); they may not pursue it in the district courts because they claim more than $10,000. 28 U.S.C. § 1346(a) (1976). We repeat that we express no views on whether a taking has occurred.

Affirmed.

Kincaid, 285 U.S. 95, 104 & n.3 (1932).

[21] The Court noted that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. § 1502 (1976), would not preclude an action under § 1491 in the Court of Claims, 453 U.S. at 689, apparently because that exception covers only taking claims derived from the treaty (or executive agreement), not those derived from the Constitution. *See* United States v. Weld, 127 U.S. 51, 57 (1888); Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 Colum. L. Rev. 822, 874-75 (1981).

THE U.S. CONSTITUTION

Art. I, Section 8, Cl. 10

The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against against the Law of Nations.

Crimes and Criminal Procedure Act

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty

and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

June 25, 1948, c. 645, 62 Stat. 685; July 12, 1952, c. 695, 66 Stat. 589.

Foreign Sovereign Immunities Act

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.
Added Pub.L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.

28 U.S.C. § 1602 *et seq.*

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in

sections 1605 to 1607 of this chapter.
Added Publ.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United Sttes by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved; *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Judiciary and Judicial Procedure Act

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Line 25, 1948, c. 646, 62 Stat. 934.

Federal Tort Claims Act

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

District of Columbia long-arm statute

13 D.C.Code § 13-423 (1973)

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a *claim for relief from the person's*—

> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia; or

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

Executive Order 12283

46 Fed. Reg. 7927.

EXECUTIVE ORDER 12283 OF JANUARY 19, 1981

NON-PROSECUTION OF CLAIMS OF HOSTAGES AND FOR ACTIONS AT THE UNITED STATES EMBASSY AND ELSEWHERE

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1-101. The Secretary of the Treasury shall promulgate regulations: (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran; (b)

prohibiting any person not a U.S. national from prosecuting any such claim in any court within the United States; (c) ordering the termination of any previously instituted judicial proceedings based upon such claims; and (d) prohibiting the enforcement of any judicial order issued in the course of such proceedings.

1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

1-103. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purpose of this Order.

1-104. This Order shall be effective immediately.

/s/ Jimmy Carter

THE WHITE HOUSE,

January 19, 1981.

31 C.F.R. Section 535.216 (1981).

§ 535.216 Prohibition against prosecution of certain claims.

(a) Persons subject to the jurisdiction of the United States are prohibited from prosecuting in any court within the United States or elsewhere, whether or not litigation was commenced before or after January 19, 1981, any claim against the Government of Iran arising out of events occurring before January 19, 1981 relating to:

(1) The seizure of the hostages on November 4, 1979;

(2) The subsequent detention of such hostages;

(3) Injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979; or

(4) Injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

(b) Any persons who are not United States nationals are prohibited from prosecuting any claim described in paragraph (a) of this section in any court within the United States.

(c) No further action, measure or process shall be taken after the effective date of this section in any judicial proceeding instituted before the effective date of this section which is based upon any claim described in paragraph (a) of this section, and all such proceedings shall be terminated.

(d) No judicial order issued in the course of the proceedings described in paragraph (c) of this section shall be enforced in any way.

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For Publication

FILED
DEC 30 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN D. McKEEL, JR., et al.,

Plaintiffs-Appellants,

vs.

THE ISLAMIC REPUBLIC OF IRAN and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

Nos. 82-5111, 82-5114, 82-5115, 82-5116 82-5117, 82-5417

DC Nos. CV 81-931 WPG CV 81-5108 WPG CV 81-5109 WPG CV 81-5274 WPG CV 81-5482 WPG CV 81-5410-CHH

OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding
Cynthia Holcomb Hall, District Judge, Presiding
Argued and Submitted December 7, 1982
Submission Withdrawn January 31, 1983
Resubmitted December 28, 1983

Before: SNEED and SKOPIL, Circuit Judges, and INGRAM*, District Judge

SNEED, Circuit Judge:

On November 4, 1979, Iranian militants seized the diplomatic and military personnel attached to the United States Embassy in Tehran. The Americans were held hostage in violation

*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the Court.

E3

FILED
FEB 22 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN D. McKEEL, JR., et al.,
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THE ISLAMIC REPUBLIC OF IRAN and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117, 82-5417

ORDER

Before: SNEED and SKOPIL, Circuit Judges, and INGRAM*, District Judge

Appellants' Petition for Rehearing is denied.

*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 18, 1984, I served the within *Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

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United States Dept. of Justice
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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 18, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)